

EXHIBIT B-173

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA) CASE NO.: 2022-EX-000024

VS.)

BRIAN B. KEMP)



ORIGINAL

FILED IN OFFICE

SPECIAL PURPOSE GRAND JURY

AUG 10 2023

TRANSCRIPT OF MOTION HEARING

CHÉ ALEXANDER
Clerk of Superior Court

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BEFORE THE HONORABLE ROBERT C.I. MCBURN Fulton County, Georgia

ON AUGUST 25, 2022, ATLANTA, GEORGIA

APPEARANCES:

FOR THE STATE:

NATHAN WADE, ESQ.
FM MCDONALD, ESQ.
ADAM NEY, ESQ.
WILL WOOTEN, ESQ.
ATTORNEYS AT LAW

FOR THE DEFENDANT:

S. DEREK BAUER, ESQ.
BRIAN F. MCEVOY
ATTORNEYS AT LAW

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1 THE COURT: This is 2022-EX-000024, and
2 we are here having a hearing this morning
3 concerning a motion that has been filed on behalf
4 of Governor Kemp by his lawyers seeking to quash a
5 subpoena that has been issued for his appearance
6 before the special purpose grand jury that is
7 investigating alleged electoral interference in
8 Georgia's 2020 general election. Why don't we
9 start -- because I think there may have been some
10 last minute additions to the ranks of lawyers here
11 -- by having counsel for the governor introduce
12 themselves, get themselves on the record and we'll
13 figure out who from the State, meaning the district
14 attorneys, will be confusing with the State here,
15 who from district attorney's office will be talking
16 as well?

17 MR. MCEVOY: Good morning, your Honor.
18 Brian McEvoy on behalf of the Office of the
19 Governor.

20 MR. BAUER: Good morning, your Honor.
21 Eric Bauer, also for the office of the governor.

22 MR. MCEVOY: We are also joined by David
23 Dove, Executive Counsel for office of the Governor.

24 THE COURT: Welcome all three of you.

25 Mr. McEvoy, you are free to divide up the

1 speaking anyway you want. All I ask is that only
2 one person at a time make a point. But if Mr.
3 Bauer's is going to be handling --I'm making it up
4 --executive privilege and Mr. Dove's going to be
5 talking about electoral cycles, fine. But let's
6 try to keep the one person for topic, if that
7 works.

8 MR. MCEVOY: Yes, your Honor. Just for
9 your Honor's understanding, Mr. Bauer will be
10 handling the immunity, sovereign immunity. Mr.
11 Dove is just here as a client representative. He
12 can answer any questions that your Honor may have,
13 and I will likely be handling the other components.

14 THE COURT: Sounds good. Good morning.

15 MR. WADE: Good morning. Nathan Wade
16 here for the State, along with Donald Wakeford here
17 for the State. And with us will be Will Wooten and
18 Adam Ney, District Attorney for the State as well.
19 The arguments will be handled by Mr. Wakeford and
20 myself if that's okay with the Court.

21 THE COURT: It is okay. Same rules, just
22 try to keep one person per topic or at least have a
23 clear dividing line so that Ms. Rivers can more
24 readily follow along.

25 MR. WADE: Yes, sir.

1 THE COURT: So Mr. McEvoy, I'm going to
2 hand it over to you in a minute. Just so you know
3 I've read the motion and the response. I can't say
4 I've read all the e-mails. I don't particularly
5 hear a lot about the e-mails, but it may be
6 germane, and so I don't mean don't talk about them,
7 but we don't need to get down into, well, that's
8 when he called me a name in an e-mail from August
9 14th. I get the drift with what the e-mails were
10 about, those that were included and those that
11 weren't, etc. But in terms of the thrust of the
12 arguments made by the office of the governor in
13 order of appearance sovereign immunity, executive
14 privilege, attorney/client privilege, and then
15 interference with the electoral cycle. You can
16 handle them in any order you want. The way I
17 process them was the way they were in the brief,
18 and the basic argument is that the governor hasn't
19 waived his immunity from, I guess, what we'll be
20 discussing how a subpoena in connection with a
21 criminal investigation is a lawsuit. But that's
22 why you handed that one to Mr. Bauer. Then we can
23 talk about executive privilege, it's existence and
24 application in the state of Georgia. And then
25 we'll manage attorney/client whatever way you want.

1 The same with the concerns about scheduling, okay.

2 MR. MCEVOY: Thank you, your Honor. I
3 had some introductory remarks that I don't think
4 really are necessary. I think Mr. Bauer could
5 probably go into the sovereign immunity argument.

6 THE COURT: Great. And I guess what I'll
7 do, while Mr. Bauer strides to the podium, is if we
8 get deep enough in the sovereign immunity I may
9 turn to the district attorney's office to get their
10 response to that topic rather than have the
11 governor's office cover all four, and then I'm
12 trying to remember what was said about sovereign
13 immunity. So, Mr. Wakeford, Mr. Wade, just be
14 ready. It may be you're bouncing up four times
15 rather than once.

16 MR. MCEVOY: Your Honor, just one
17 housekeeping item. We do have a -- sort of a Power
18 Point and some exhibits that we may or may not go
19 through. I've got a complete set for the State and
20 a complete set for your Honor.

21 THE COURT: To that end, the best way to
22 share things would be to join the Zoom session and
23 I think you've got that link. And if you did, then
24 you can share your screen. I currently have you in
25 the Zoom call, but maybe your law firm has a way

1 that's penetrating our Zoom system from a satellite
2 somewhere and it's going to come that way.

3 MR. MCEVOY: We'll figure that out.

4 Can I approach just to give your Honor
5 hard copies?

6 THE COURT: But please like don't plug
7 things into things because that may disconnect
8 something. So the best way is to join the Zoom and
9 then share screen.

10 MR. BAUER: Good morning, your Honor.
11 It's a pleasure to be here. As you know, the
12 governor's motion to quash the subpoena is on three
13 grounds: Lack of jurisdiction, that's sovereign
14 immunity, improper purpose, and failure to
15 accommodate important privileges. As Mr. McEvoy
16 just reported to you, I'm going to address the
17 jurisdiction issue, and he is going to speak to the
18 other issues.

19 As the Court knows from the papers, we
20 believe the century old doctrine of sovereign
21 immunity precludes the county district attorney
22 from using the superior court's compulsory process
23 to subject a sitting governor to an inquiry
24 regarding the performance of his official duty
25 absent some expressed waiver does not exist. I

1 know that the Court is deeply familiar with the
2 doctrine of sovereign immunity. I know you just
3 issued a detailed order in which you had to emerge
4 yourself in it.

5 THE COURT: Had a recent crash course.

6 MR. BAUER: That's right. In another
7 matter.

8 THE COURT: Thank you, solicitor general.

9 MR. BAUER: I do not intend to bark at
10 the Court about things the Court already knows well
11 because I do think this issue may be destined for
12 additional review at some point one way or the
13 other. I hope you will indulge a little bit of
14 exposition on that issue. I do feel like to start
15 off, and I think Mr. McEvoy may have been intending
16 to do this in his opening remarks, but you
17 indicated in response to the motion that was filed
18 it's a bafflement as to why we're in the position
19 we're in. Why you were getting a motion to quash
20 on sovereign immunity at this point in this
21 investigation, and --

22 THE COURT: And by point I meant on the
23 eve of the appearance date that had been carefully
24 negotiated with input from the governor's office at
25 governor's counsel request.

1 MR. BAUER: Correct.

2 THE COURT: Just so everyone understands

3 --

4 MR. BAUER: Absolutely. Stuff could
5 change and that was an issuance of a subpoena, and
6 Mr. McEvoy will speak to the relevant details of
7 those communications and what the governor's
8 agreement or agreement he thought he had with the
9 district attorney's office was on that. But we're
10 equally frustrated. When we got that subpoena we
11 were equally baffled because there are some serious
12 limits to the authority of a special purpose grand
13 jury. And I think more relevant here the authority
14 of a local county prosecutor when you're talking
15 about using the court's process to compel the
16 sitting governor to do anything in relation to his
17 official duties. And so once that subpoena was
18 issued, and we believe it was ultra vires, the
19 motion became necessary. And I just want the Court
20 to know that its frustration is shared.

21 THE COURT: So the subpoena flowed from
22 the scheduling discussions we had that yielded the
23 date that was suppose to work for both the governor
24 and his lawyer. It was after that discussion that
25 the subpoena -- I was under the impression that

1 there had been a subpoena but people just agreed
2 we're going to change the date because there was
3 conflict X, conflict Y, conflict Z.

4 MR. BAUER: That's not what happened.

5 THE COURT: So there's only been one
6 evidence subpoena.

7 MR. BAUER: There was a document subpoena.

8 MR. MCEVOY: Your understanding is
9 correct, your Honor, and I can address those
10 logistical issues which were there in part
11 exacerbated by my own personal travel. I'm happy
12 to talk about it now or later.

13 THE COURT: No, no, no. I -- Mr.
14 Bauer's helping me understand why the motion came
15 when it did, and there was something that changed,
16 and that was a subpoena. So was it -- I may be
17 asking questions. I'm not trying to do this to you
18 that are Mr. McEvoy's questions, but was it the
19 plan that the governor was going to appear on that
20 date which I think was last week without a
21 subpoena? In other words, he wasn't asking for one
22 and then -- and the District Attorney's Office can
23 explain its own actions-- belt and suspenders-- hey
24 we got this understanding, but let's send a
25 subpoena anyway just to memorialize. You don't

1 need to answer for the DA's Office, but I guess
2 more bafflement. If everyone had agreed that this
3 is the date that the governor is going to come in
4 and testify before the special purpose grand jury
5 as did his secretary of state as -- but the
6 secretary of state, other people. If the only
7 thing that changed was well, let's make it
8 official. Here's an invitation. It's a subpoena,
9 but it's an invitation. What -- I guess, I'm
10 confused if there was an understanding that he was
11 coming anyway, the subpoena -- he could say I
12 don't need that subpoena. But now that it's a
13 subpoena he doesn't want to come. I guess I need
14 to understand that.

15 MR. BAUER: Mr. McEvoy's going to explain
16 that to you in crystal clear detail, but there
17 wasn't firm understanding. There had not been an
18 agreement on that date or the terms of appearance.
19 The subpoena was new. It was not by agreement. It
20 was not invited, and it was not welcomed, nor do we
21 think it's necessary. But more important for legal
22 issue in front of you today, it's not legally
23 proper. So, the governor's position is very
24 straight forward. Sovereign immunity is
25 jurisdictional. No court can exercise jurisdiction

1 over state or it's chief executive without consent
2 in the form of constitutional waiver or statutory
3 waiver that meets the criteria that the Court is
4 familiar with for such a statutory waiver.

5 THE COURT: So, true with lawsuits.
6 Maybe you're getting there. I know you're getting
7 there. Let's get there. Because to me the real
8 issue here is how does sovereign immunity apply if
9 at all in the criminal context. I want to be very
10 clear. No suggestion that the governor or his
11 office is connected to criminal activity. I think
12 if one were to summarize the theory of the
13 investigation the governor was almost the target of
14 the targets. And so it would be lower case
15 v-victim of pressure to do things that one theory
16 is working proper post election. But it's in the
17 criminal context, and so I did look long and hard
18 at all the cases that were cited and they all
19 involve someone trying to sue governor, the state,
20 whatever it is, lawsuits, civil action. And apart
21 from the email exchanges there's not a whole lot
22 civil about what's going on with the grand jury
23 right now.

24 MR. BAUER: I'm going to address that
25 particular point, the specific language suit,

1 lawsuit action where that shows up.

2 THE COURT: Okay.

3 MR. BAUER: Why that's not the limitation.
4 I think it would be crystal clear when I'm done.
5 But I think given the DA's opposition what they
6 filed late Tuesday -- I think I need to take a
7 step further back. And while, as you know, our
8 motion was based on jurisdictional issues arising
9 from sovereign immunity, the opposition that the
10 District Attorney's Office filed I think has raised
11 another issue that we have to educate the Court
12 about today, which is the fundamental statutory
13 limits of a special purpose grand jury and it's
14 authority and by extension the DA. So, their
15 opposition appears to be based on two things. One,
16 a fundamental misunderstanding of the grand jury
17 and the county DA's authority. And to a narrow
18 reading of the word "suit" the issue you just
19 raised, that's neither legally, historically,
20 contextually, logically historic. And I have a few
21 of those in that order to educate the court.

22 THE COURT: Sure.

23 MR. BAUER: I read the special
24 prosecutor's brief Tuesday night, and read it again
25 last night. And what jumps out at me is they think

1 their authority is unlimited if what they're doing
2 is (a) a criminal investigation, and (b) their
3 investigation. And there are no constitutional
4 separation of powers or sovereign immunity or
5 statutory limits on that jurisdiction and authority
6 if what they're doing is a criminal investigation.

7 THE COURT: Well, I think that overstates
8 it a bit. We've been navigating. There are all
9 sorts of limitations. There's attorney/client
10 privilege. There's legislative privilege, etc. And
11 the district attorney's office has pushed against
12 that, but ultimately acknowledged that there are
13 certain things that even in the 5th amendment
14 privilege that stand in the way of unfettered
15 inquiry with the witnesses who do appear in front
16 of the grand jury.

17 MR. BAUER: You only get that far. You
18 only get to analyze whether they have to respect
19 the privileges if they had -- or more importantly
20 the special purpose grand jury has the authority to
21 do whatever it's doing anyway.

22 THE COURT: Agreed.

23 MR. BAUER: And we've got to go back now
24 and look at what that authority is because their
25 position is that as long as what they're doing in a

1 criminal investigation there are no limits on that
2 and they could haul in the governor and they don't
3 have to pay attention to these other jurisdictional
4 constitutional issues. It's wrong on every level.
5 Starting with, this is actually not a criminal
6 investigation. So, slide one I put up here for
7 you, this is a civil investigation. And in civil
8 investigations a special purpose grand jury and the
9 district attorney's that's aiding it have no
10 authority under established Georgia law to
11 investigate state offices. They simply don't. I
12 said civil, and I saw the Court's reaction to it,
13 but that is what a special purpose grand jury does.
14 And I think the Court has actually recognized this,
15 albeit indirectly, it's one of your other orders in
16 this matter. They keep saying it's a criminal
17 investigation and it's their investigation and it's
18 neither. The investigation -- and understanding
19 why those are both wrong is crucial to
20 understanding what the special purpose grand jury
21 is authorized to do and what it's not. And we got
22 to look at that before we even get to can they use
23 it to haul the sitting governor into testify about
24 its duties. So, we're lucky the Georgia appellate
25 courts have actually answered this question for us.

1 So, number (1), it's a grand jury investigation.
2 It's not a DA investigation. While the DA aids it,
3 it's the grand jury that investigates. I know the
4 Court is very familiar with that construct. And
5 because it is a special purpose grand jury
6 investigation, it's by definition is civil and it's
7 not criminal no matter how they want to dress it
8 up. This is because the special purpose grand jury
9 is a civil investigative body only. It has no
10 power to indict. And this is what I think your
11 Honor has noted in some of your orders in this
12 case. It doesn't have any power to indict. It has
13 limited power to interview witnesses, and it can
14 only issue a report. There is simply nothing
15 criminal about its process of investigation. And
16 whatever it does in that process, in that ultimate
17 report, they belong to the grand jury. They don't
18 belong to the district attorney. So, this slide
19 tells you what the Georgia Court of Appeals has
20 said about the nature of the special purpose grand
21 jury, and there is a number of cases about them.
22 The first one was the State vs. Bartell case from
23 1996, in which the Court of Appeals was trying to
24 figure out does it matter whether this grand jury
25 came under the special purpose statute or the

1 regular grand jury statute. And they said, no, it
2 doesn't matter. Because what this particular grand
3 jury, the regular grand jury's doing was civil, not
4 criminal in this particular case. Either way, we
5 don't have to add to that question, but special
6 purpose grand jury's only do civil investigations
7 because they can't indict. That was reinforced
8 Kennerly vs State in 2011.

9 THE COURT: Why does the lack of power to
10 indict -- I agree with you that the special purpose
11 grand jury cannot bring charges, and we've had to
12 explain that to -- through witnesses, to all sorts
13 of folks. Why does that mean it's not a criminal
14 investigation or criminal investigative body as
15 opposed to civil? Wouldn't one look to -- I'll
16 call it the charter. So, the chief judge signed an
17 order authorizing the creation of the special
18 purpose grand jury and its purpose was not to
19 investigate civil matters; it was to investigate
20 alleged criminal interference with the 2020 general
21 election. So criminal, criminal, criminal, not
22 civil, civil, civil. What -- why is simply the
23 lack of the ability to -- a police officer cannot
24 indict anyone. But if a police officer is asking
25 you questions that's not civil investigation, it's

1 a criminal investigation.

2 MR. BAUER: Sure. And it would trigger
3 different constitutional concerns obviously. And
4 you know, the court of appeals cases that have
5 answered this, and they are the only cases in the
6 State that have actually looked at the nature of
7 the special purpose grand jury on this question.
8 They haven't expanded, you know, particularly
9 helpfully on that distinction. But I think the
10 reason is because particularly when you're
11 investigating state or even local government actors
12 who have special immunities that ordinary citizens
13 may not have, then criminal versus civil, the
14 nature of the investigation in the grand jury does
15 become a structural issue with respect to, you
16 know, are you subject to jurisdiction. And if it's
17 civil, if you're talking about government officials
18 acting in the course of their official duties in a
19 civil investigation, particularly when you're
20 talking about the state, sovereign immunity is a
21 bar. And so, I think this rule is recognizing that
22 when you are investigating a criminal act and you
23 have probable cause to believe there's been a crime
24 committed, by definition that's outside the scope
25 of an official state duty. And so, I think that's

1 where the court's are drawing that distinction and
2 answers your question. But we don't have clarity
3 from the appellate courts about your specific
4 question, is it indictment or no. But in these
5 cases, and I'll urge the Court to read them, they
6 say if the grand jury can't indict, if it can't
7 make a presentment, and all it can do is issue a
8 report, then it's civil, it's not criminal. And
9 they view that distinction as important. But
10 here's why it's particularly important in this
11 case.

12 THE COURT: What about on the federal
13 level? Because I know this isn't your space, but
14 this executive privilege is being imported from a
15 lot of federal cases. So, federal grand jury's
16 they can investigate civil. They can investigate
17 criminal. If it is a criminal investigation at the
18 federal level, but it's merely designed -- I guess
19 it's tricky because that -- there are no special
20 purpose grand jury's. That grand jury is a
21 multipurpose tool. It may be used at that point
22 only to investigate. And the U.S. Attorney's
23 gathers enough information and says we choose not
24 to present an indictment to that grand jury. But
25 what do you know about what federal case law says

1 about sovereign immunity and a federal grand jury
2 if the focus is criminal activity? Not, hey,
3 should we have remunerated people's whose land we
4 took more, but it's focused on a RICO allegations?

5 MR. BAUER: I know enough to be
6 dangerous.

7 THE COURT: For your side or the other
8 side.

9 MR. BAUER: For everybody. I don't want
10 to tell you, you know, with certainty that I'm
11 about to tell you an issue of law that I'm correct
12 on, particularly with respect to a federal criminal
13 investigation of a sitting executive office of the
14 president. I think the Supreme Court has said you
15 can't do that while the president is in office.

16 THE COURT: But this is not an
17 investigation of the governor. It's not an
18 investigation of the governor. Again, the -- as I
19 understand the theory of the investigation, if the
20 governor were to fall into a category, it would be
21 victim, in his official capacity. So, that's not
22 the right framework. Because I understand that
23 there might be limits to say you can't --
24 executive and executive. But Department of Justice
25 you cannot use a grand jury against a sitting

1 executive president to investigate that individual.
2 But that's not this situation.

3 MR. BAUER: It's not. And I think the
4 federal cases that are applying sovereign immunity
5 through to subpoenas give you that road map. They
6 are telling you that unless the State has said one
7 of our people can be a witness in your proceeding,
8 without sovereign immunity being waived you can't
9 do that. But, you know, the Federal Court -- the
10 Supreme Court has looked -- is interesting to see
11 they've cited the Paula Jones case against Clinton.
12 We can haul in a sitting judge if we want to, and
13 the Supreme Court has said that conduct has nothing
14 to do with the discharge of his official duties.
15 You can call him in for a deposition, but I think
16 they said that case aint going to trial until he's
17 out of office. Because you cannot interfere with
18 the performance of his official duties. I don't
19 think this is any different, and Mr. McEvoy could
20 talk about the ethical guidelines that go to
21 prosecutions and why they are separate and apart
22 from whether there's a Supreme Court case that says
23 federal grand jury's can't haul in the president to
24 be a witness in the investigation of some other
25 person's crime. DOJ guidelines say you don't do

1 that during election season. Even if you got a
2 really good reason to talk to somebody, if they're
3 in an election and you have authority to talk to
4 them, you still don't do it.

5 THE COURT: We're getting off topic.
6 We'll get to that.

7 MR. BAUER: So, here's the problem.
8 You've got these cases.

9 You can go to slide two, please.

10 You've got these two cases that come out
11 of the Georgia Court of Appeals. It's a Floyd
12 County case. They're related to a grand jury that
13 Floyd County had. There are two different grand
14 jury's, two different cases. But what the court of
15 appeals said in these two cases -- and one you can
16 look at in particular is: In Re Floyd County Grand
17 Jury presentments for May term 1996. 245 Ga. App
18 705. At the bottom of the screen. Court of
19 appeals said, look, you're a county grand jury.
20 You do not have any statutory authority to
21 investigate state offices or state officers.
22 Particularly -- that the one I just quoted you was
23 a special purpose -- was not a special purpose
24 grand jury, but it was conducting a civil
25 investigation just like this special purpose grand

1 jury has to do. And says you can't use a civil
2 investigation, local grand jury to write a report
3 that is derogatory to a state officer. That is
4 beyond the scope of your authority. You can't do
5 it.

6 THE COURT: You keep calling it a local
7 grand jury. What is the local part other than to
8 make it sound like we're out in the sticks.

9 MR. BAUER: Well, I think because there's
10 a distinction and a hierarchy of sovereignty of the
11 state. And state and subordinate political bodies,
12 and a county grand jury, which is authorized by a
13 county superior court judge, who by all means whose
14 authority we respect greatly --

15 THE COURT: But that wasn't my point. But
16 there's no other grand jury in Georgia. There's
17 federal.

18 MR. BAUER: That's right.

19 THE COURT: And there's a state grand
20 jury. It doesn't have statewide authority
21 necessarily, but I just want to make sure I wasn't
22 missing something that the attorney general
23 believes -- well, I actually could convene a
24 special, special grand jury that has statewide --

25 MR. BAUER: It's a grand jury that is

1 required to be convened by a county superior court
2 judge who's elected by a local county electorate,
3 not statewide, in overseeing generally -- unless
4 there's an attorney general involved -- by a local
5 county prosecutor. And so I think what this case
6 is saying is look, these two cases. You can't --
7 the State has not suborned its sovereignty to these
8 local bodies in this way. If you're going to
9 investigate the State in this state that authority
10 rests with the attorney general, the governor,
11 ironically, and the general assembly. And each of
12 them have been given that authority by statute or
13 constitution or both. So, you can look at them.
14 O.C.G.A. 45-15-17 is the statutory authority that
15 says attorney general you can investigate state
16 offices. And then 19 is general assembly, you can
17 do it, too. What you won't find and what these
18 cases say you can't do is have a county grand jury
19 doing a civil investigation of state officers or
20 state offices. So, I point this out just because,
21 you know, reading their position, which is as long
22 as we think it's criminal we can do what we want
23 and we're not bound by any limitations. Then we
24 have to go back and look at this and say, well,
25 wait a minute, is this a criminal investigation.

1 And the courts say special grand jury can't do
2 that. And do they have the authority to go beyond
3 their local jurisdiction and haul in state
4 officers. And all of these statutes and these
5 court of appeals cases say you can't do that. You
6 cannot usurp the authority of the AG and the
7 general assembly or the governor for yourself as a
8 state prosecutor.

9 THE COURT: Because in Floyd County they
10 were investigating DFACS, which is a state agency,
11 and it was an investigation into the operations of
12 the state agency, etc. which that grand jury
13 thought, hey, we're able to inspect our clerk's
14 office. And I don't know what gave them the wild
15 hair to go after DFACS. Again, not this situation.

16 MR. BAUER: So -- but what they were
17 doing -- they could still subpoena records from
18 DFACS. It's interesting that the grand jury's
19 authority does allow them. Specifically, it trust
20 you to get documents from state departments. But
21 what it can't do, and what this court says was
22 quashed in that case was, you can't subpoena DFACS
23 employees. We weren't even talking about head of
24 DFACS. We're talking about low level people.

25 THE COURT: Right. Investigation into

1 the operation of DFACS as opposed to an
2 investigation into maybe there was a hacking attack
3 on DFACS. And so they're just trying to figure
4 out, hey, you were a victim of hacking. Tell me
5 what you saw on your computer screen when the
6 ransom ware appeared. That's different.

7 MR. BAUER: Okay.

8 THE COURT: But who knows.

9 MR. BAUER: I'm sure the grand jury could
10 have articulated a narrower way to phrase what they
11 were trying to investigate that made it less direct
12 on DFACS. But either way, the Court of Appeals
13 says if you want to take it to state officials,
14 that's the AG's purview, that's the general
15 assembly's purview. That's not something you can
16 do here. But that's just the statutory limits that
17 the courts have put on grand jury authority. And
18 there's no recognition of it at all or the fact
19 that the special purpose grand jury is civil by
20 definition. Can't be anything else in --

21 THE COURT: And you say that because of
22 Bartell?

23 MR. BAUER: Bartell and Kennerly, yes.

24 THE COURT: Yes. Kennerly just said you
25 can't indict, but you'd marry the two because it

1 can't indict it must be civil.

2 MR. BAUER: I think that's a clear
3 implication of those cases. We don't even need to
4 go there. We need to make our record. They
5 attacked or demonstrated that they do have
6 statutory authority to do it. We don't even have
7 to wade through that thicket to dispose of this
8 subpoena because sovereign immunity is not
9 structural. It's not based on suit or lawsuit or
10 action or claim or any of those, you know, words
11 that you can interchange and are interchanged in
12 law. It is jurisdictional.

13 So, could you go to slide three, please.

14 I know the Court's aware of the
15 common-law jurisdictional doctrine. It actually
16 predates the charter of the state of Georgia in our
17 first constitution. But it was constitutionalize
18 in 1974. So we don't have to worry about is it
19 common-law or is it constitutional. It is
20 constitutional. And it is jurisdictional. The
21 McConnell case from 2017. And Conway case makes
22 it very clear that it's not structural, it is
23 jurisdictional as do half a dozen other cases in
24 the state that have reviewed it.

25 Now, the special prosecutor argues that

1 sovereign immunity is tethered to the nature of the
2 legal process at issue as if it matters what forum
3 of legal process is being asserted against the
4 State. And I'm going to show you that's not the
5 case. The entire argument appears rooted in the
6 issue that you've raised, which is they believe the
7 word "suit" appearing in certain provisions in the
8 Georgia constitution that provide for express
9 waivers of the jurisdictional immunity means that
10 sovereign immunity only applies in the context of
11 an actual complaint filed naming the State or its
12 officers as a nominal defendant. But when you look
13 at how that word "suit" or "lawsuit" or "action,"
14 those words are actually used in the Georgia
15 constitution with respect to the application of the
16 jurisdictional bar, it's clear that there is no
17 such limitation. Because the provisions in the
18 constitution that say we, the State, are immune
19 from jurisdiction, they don't have that language
20 there. I'm going to show you why and where that
21 is. And there's no other defined mechanism or
22 process at all that limits that jurisdiction. So,
23 you know, even if you accept his argument that suit
24 or lawsuit means a complaint or petition or some
25 defined cause of action, which according to Black's

1 Law Dictionary -- by the way that's not what those
2 words mean. It doesn't. So, let's look at the
3 constitution. So, this is Georgia Constitution
4 Article 1 Section 2 paragraph 9. This is the
5 primary provision in the constitution that provides
6 for sovereign immunity. And up until the amendment
7 a few years ago that constitution was the sole
8 location in the constitution where you would find
9 any waiver. So, the key provisions in here that
10 actually provide for the -- they incorporate the
11 common-law sovereign immunity are subsections (e)
12 and to a lesser extent (f). So, let's look
13 primarily (e) here. (E) is the actual expression
14 of immunity in the state of Georgia. This is the
15 source language. "Except as specifically provided
16 this paragraph, sovereign immunity, no limitation,
17 no suit, no action, no law suit. It extends to the
18 state and all of its departments and agencies, the
19 sovereign immunity of the State and its departments
20 and agencies can only be waived by act of the
21 general assembly, which specifically provides
22 sovereign immunity is thereby waived to the extent
23 of such waiver." That is not limited to any
24 specific cause of action. As you know, you very
25 articulately laid out the history of the Supreme

1 Court's look at these provisions over the last 10
2 years, last week. They are issuing opinions that
3 expand the scope of that and clarify, making sure
4 that people who are concerned that they don't know
5 what it applies to know it applies to everything.
6 But if you look at this source language it is not
7 limited. It doesn't say sovereign immunity the
8 State enjoys it only for suits, lawsuits, actions,
9 claims. That's just simply not what it says. So
10 where does that language come from. You can find
11 it in the exemptions, express waivers, and only
12 there.

13 THE COURT: And they're all for civil
14 actions.

15 MR. BAUER: And they are specifically
16 identified. So, the only place those limiting
17 descriptors show up is when they are in the
18 constitution explaining the limits of those express
19 waivers. So, you got the constitution saying we
20 are immune unless we tell you otherwise.

21 THE COURT: But immune from what?

22 MR. BAUER: Jurisdiction. You can't
23 bring me into court for any reason. It is
24 jurisdictional bar. The State is above the reach.

25 THE COURT: Where is there a case ever

1 that says that includes criminal proceedings?

2 MR. BAUER: It doesn't have to unless
3 there is an expressed waiver for it. Now --

4 THE COURT: But then there'd be a case
5 that says, oh, you actually can't haul this person
6 into court for criminal proceedings because of
7 sovereign immunity. One of these local prosecutors
8 with a local judge would have tried it, and if
9 sovereign immunity prevented a state actor from
10 being hauled into court in connection with a
11 criminal investigation you know there'd be a case
12 about that. Your brief says nothing about that.
13 So, I guess, that's what I -- we don't need to
14 quibble about what "suit" means. Pick your words:
15 Suit, action, complaint, etc. The dividing line as
16 I understood it, civil and criminal. And there
17 were no cases in your brief. You have mentioned no
18 cases yet is what I would have led with. Oh, look
19 at this case from the Georgia Supreme Court.
20 Georgia Court of Appeals, wherever that says, hey,
21 sovereign immunity also applies to criminal
22 actions. Because, of course, the State is an actor
23 in a criminal action. So, this notion of importing
24 sovereign immunity gets kind of sticky because it's
25 State vs. State. And I appreciate you've used the

1 word "local" in front of everything. If there were
2 an indictment from the grand jury that processes
3 the special grand jury report, that indictment
4 wouldn't say local Fulton County. It would say
5 state of Georgia vs. -- there's is two people.
6 Some of them might be state actors. And I don't
7 believe those state actors could say, oh, sovereign
8 immunity, you can't indict me. But I could be
9 entirely wrong. I'm just waiting to see that case
10 that says if you're in the criminal realm sovereign
11 immunity doesn't apply. Isn't that the argument of
12 the District Attorney's Office?

13 MR. BAUER: Okay. So, that appears to be
14 their argument.

15 THE COURT: So pretend it's my argument
16 now. Say why that doesn't work.

17 MR. BAUER: Just because you label it
18 criminal doesn't make it a criminal proceeding.

19 THE COURT: And that's your argument
20 that, look, this special purpose grand jury is
21 actually a civil thing. And if you're right,
22 civil, I agree, sovereign immunity. I don't see
23 any waiver anywhere. But indulge me for a moment.
24 You know what, it's a criminal investigation. The
25 only discussion is criminal statutes. The only

1 concern is was there criminal interference with a
2 2020 general election in Georgia. So, it's a
3 criminal investigation. No jurisdiction.

4 MR. BAUER: It's an investigation into
5 whether a crime was committed, but it's not a
6 criminal investigation because it cannot result in
7 any criminal indictment or presentment being made.
8 That was the choice of the District Attorney when
9 they opened this investigation. They chose to go
10 to the route of a special purpose grand jury that
11 can just write a report. That's all they can do.
12 And that doesn't convert this into a criminal
13 inquiry. And I don't think it's settled by any
14 stretch that even if this were a criminal grand
15 jury proceeding that the DA could summon the
16 governor to it as a witness only to talk about the
17 performance of his official duties while he sits in
18 office.

19 THE COURT: I don't know if it's settled,
20 but you haven't shown me anything that says that
21 couldn't. I guess I'm curious if it were a GBI
22 investigation. So, they can't indict anything
23 either and they're trying to interact with folks,
24 and they try to get legal process to do something.
25 Sovereign immunity? No, you can't do it because we

1 haven't waived it. It's not -- I think what you're
2 bumping up against is the fact that even though it
3 doesn't say civil in Article 1 Section 2 Paragraph
4 9, sovereign immunity applies to civil action suits
5 against the State. But if it's criminal it is the
6 State. The State is the actor.

7 MR. BAUER: Justice Blackwell gave us the
8 history lesson a few years ago.

9 THE COURT: And Peterson. We got a lot
10 of history lesson.

11 MR. BAUER: We got a lot of lengthy
12 decision, but they're not really complicated. And
13 what they're saying is, and the reason we had this
14 constitutional amendment a few years ago is that
15 Lakeford vs. [Hugh] Case came out and basically
16 said, sorry guys, you got nobody to sue.

17 THE COURT: Sue to bring a civil lawsuit
18 against?

19 MR. BAUER: In that particular case, yes.
20 But what they said was the sovereign immunity is a
21 jurisdictional bar that is virtually absolute,
22 broad sweep is the language they used, and dates
23 back to the sovereignty of the King. It's not
24 about the nature of the process or the nature of
25 the tribunal. It's about whether the State like

1 the King of Old has consented to jurisdiction.
2 Now, the King of Old couldn't be compelled into any
3 court he didn't want to go to. We're a little more
4 sophisticated than that. You're the King, state of
5 Georgia, which include its chief executive, the
6 governor. But we're going to carve a little bit
7 out of that, and we're going to say unless the
8 State has put it in the constitution or the general
9 assembly has done it, and the governor ironically
10 signs it, you're above the law as far as process
11 and tribunal's concerned for your official duties.
12 And this is really the keep point here. They are
13 not trying to summon the governor to talk to him
14 about things that were outside the scope of his
15 official duties. They want to talk to him about
16 what he was doing in office performing his duties.
17 He is the King for purposes of sovereign immunity
18 jurisdictional bar unless the constitution or the
19 general assembly has said otherwise, and they
20 haven't. Now, I'm --you know -- you're not going
21 to agree with me. I don't think that the special
22 purpose grand jury isn't criminal, it's civil. And
23 I think that answers the question. But the
24 governor is not above the law. He's never
25 contended he's above the law.

1 THE COURT: He's just the King.

2 MR. BAUER: Subject to -- he's the State,
3 right. He is not the King; he's the State. But
4 that immunity of the State which his office has to
5 enjoy and protect, not just for the performance of
6 his duties but for the next governors, and the next
7 governors. Yes, the State enjoys in the Supreme
8 Court's words absolute immunity, unless it is
9 consented otherwise, through these processes.
10 General assembly or constitution, it doesn't exist.
11 And I don't think we or the governor have the
12 luxury of pretending that immunity doesn't exist,
13 and it is a jurisdictional bar because it's
14 politically convenient for him to do so. Mr.
15 McEvoy is going to talk to you about all the
16 efforts that the governor has made to try to engage
17 with this investigation, but once that subpoena
18 issue he was put in a position where he had to
19 either enforce the law of the state of Georgia,
20 which includes making sure that there is no
21 inadvertent waiver or derogation of this important
22 immunity the State enjoys and he is duty bound to
23 protect.

24 THE COURT: Is there a particular reason
25 we're having this discussion now and not when -- I

1 think this is how it played. I may be mistaken.
2 The secretary of state fall under this definition.
3 Received a subpoena. Attorney General, the chief
4 law officer of the state received a subpoena. Why
5 is it the King rather than his chief counsel or the
6 secretary of state?

7 MR. BAUER: It's a fair question. Mr.
8 McEvoy and I would have very much liked to have
9 been --

10 THE COURT: Engaged in --

11 MR. BAUER: Counsel to those gentlemen
12 before they made their decision, but they do enjoy
13 the same sovereign immunity.

14 THE COURT: It could be the same
15 argument. And they could chose to enforce it or
16 say I'll honor the subpoena and let this grand jury
17 hear what I have to say.

18 MR. BAUER: The Court is sophisticated
19 enough to know that both of those state officers,
20 they have had independent reasons. One primary one
21 being the timing of the outreach.

22 THE COURT: Months ago.

23 MR. BAUER: For -- and scope. We don't
24 know what kind of discussions their legal team had
25 with the District Attorney before they agreed to

1 come talk. We don't know if they were reassured
2 that their executive privileges, their
3 attorney/client privileges, the scope of the
4 questions would be limited and appropriate. We
5 just don't know. That's questions that I think
6 they would have to answer. But sovereign immunity
7 is not there's to waive. And while the attorney
8 general is one of the law enforcement officers who
9 has a duty to uphold the law in the state of
10 Georgia, the governor is the chief executive. And
11 the constitution is very clear that he doesn't have
12 the luxury of ignoring something as important to
13 the State's continuing operations as this
14 jurisdictional principle merely because he was
15 going to be put in this awkward and uncomfortable
16 situation where he's, you know, being disparaged on
17 a daily basis for the way this process has
18 unfolded. He did not choose to have the subpoena
19 implicate this important jurisdictional doctrine,
20 but it did. As soon as it was issued he was left
21 without a choice if he was going to fulfill his
22 constitutional duty to make sure that that immunity
23 is upheld and protected. The Court --

24 THE COURT: So, I want to follow. I
25 follow most of that. He was left without a choice.

1 Are you saying he, the governor, didn't have the
2 same liberty that the secretary of state or the
3 attorney general and could have elected -- it would
4 have set a precedent that governor in his wisdom
5 would have made, but could have said, all right,
6 you know what, I'm going to showup anyway. I don't
7 necessarily think this is something that has
8 jurisdiction over me. It's a piece of paper that I
9 could choose to ignore, or as you said, he had no
10 choice but to. And I assume that was to defend --

11 MR. BAUER: And it's rhetorically because
12 honestly these proceedings are suppose to be
13 secret, the grand jury investigation. Yet, somehow
14 this stuff plays out on the front page of the paper
15 seemingly multiple times a week. I don't actually
16 know whether the attorney general and secretary of
17 state were subpoenaed or whether they were
18 appearing voluntarily.

19 THE COURT: Me neither.

20 MR. BAUER: Mr. McEvoy is going to tell
21 you at length what efforts the governor made to
22 engage voluntarily with the District Attorney's
23 Office. So, the change, the duty to make sure that
24 he is not complicit in an unauthorized
25 investigation exceeded its authority came when that

1 subpoena issued. So, you know, we kind of talked
2 jokingly about the State being the King, and I'm
3 not trying to suggest that the governor views
4 himself in that way. I have to clarify because
5 we've got lots of people watching.

6 THE COURT: Understood. Me neither. You
7 were simply going historical, and the term is
8 sovereign immunity. There is no sovereign in
9 America, but there is a head of the government and
10 head of the executive branch, and our duly elected
11 governor. And that would be where sovereignty
12 starts.

13 MR. BAUER: That's right. And the
14 principal derives from the King. And so you have
15 to understand that context to properly apply the
16 principal here. But the governor doesn't think
17 that he is beyond any reach of law; he is just
18 beyond the reach of this particular subpoena
19 because there are other mechanisms. If the State
20 needs or wants to investigate the official
21 activities of the governor, that legal authority
22 does exist. It just doesn't exist with this
23 special purpose grand jury. It exists with the
24 attorney general, with the general assembly on
25 multiple levels. And constitutionally, there are

1 proceedings. We've seen them at the national level
2 where the legislatures can hold the chief executive
3 accountable for violations of law or other
4 misconduct related to the official performance of
5 his duties. They get to do --

6 THE COURT: Sure. With a slightly
7 different setting again. Again, my understanding
8 is not that the purpose of the subpoena was to hold
9 anyone accountable, but to gather information,
10 investigate. It's a body that can't hold anyone
11 accountable.

12 MR. BAUER: That's right. So, I'm going
13 to wrap up, I think, with that point. You know,
14 the governor wasn't looking for an unnecessary
15 fight with an important branch of his
16 administration. But he does need to defend the
17 important constitutional and statutory limits of
18 the grand jury's authority to protect the next
19 sitting governor from what I'm not suggesting its
20 misuse here. Some might. But the next governor
21 needs to know that his office is protected from,
22 perhaps, an over zealous administrator of a special
23 purpose grand jury. So, we're here asking the
24 Court to follow the clear law, what we think is the
25 clear law of the state and hold the special purpose

1 grand jury to that law, to its statutory limits and
2 to its jurisdictional limits. We think the
3 subpoena is ultra vires. It's due to be quashed
4 for lack of jurisdiction. And I will leave the
5 Court with this. You know, it's kind of where I
6 started. If there's any doubt in the Court's mind
7 about where these lines are drawn, we're going to
8 need appellate clarity on this. And proper avenue
9 here is to defer to the protection of the
10 constitutional principles and the State's
11 sovereignty defer to the jurisdictional bar until
12 the appellate courts tell us that's not the right
13 way to do this to answer the questions that you've
14 asked. So, we would urge the Court if you have
15 questions or concerns about the reach of sovereign
16 immunity here, that you give us the quash order and
17 let the State take it up if they want, and we'll
18 get the clarity from the appropriate appellate
19 court.

20 THE COURT: All right.

21 MR. BAUER: Thank you.

22 THE COURT: Mr. Wakeford.

23 MR. WAKEFORD: What opposing counsel just
24 said, if your Honor has questions just quash the
25 subpoena. But your Honor asked several questions

1 and I didn't hear from opposing counsel answers to
2 those questions. So, this proceeding, which is
3 clearly criminal, why is it civil? This proceeding
4 which is not a lawsuit, but instead a subpoena, why
5 does sovereign immunity apply to that? There has
6 still not been a direct answer to those questions.
7 And finally, where is the authority for this
8 position? Where is the case that states that the
9 governor can have his subpoenaed quashed on these
10 circumstances? Well, there were not answers to
11 those questions. So, I'm at your Honor's disposal.
12 If you have questions for me, but our position is
13 that this is a criminal proceeding. Sovereign
14 immunity applies to immunity from suit.

15 THE COURT: What makes it a criminal
16 proceeding? I guess what I'd like you to focus on
17 is, it's not quite exactly where Mr. Bauer started,
18 but page two. Bartell -- I understand what
19 Kennerly says. Different sides have invoked
20 Kennerly. I've invoked Kennerly. Just to let
21 everyone know this grand jury is issuing a report,
22 not an indictment. That's the extent of their end
23 game authority. To me it's less clear they've
24 extended their authority to summons people before
25 them. What makes this special purpose grand jury a

1 criminal proceeding as opposed to a special grand
2 jury. That special grand jury that was
3 investigating something plainly civil.

4 MR. WAKEFORD: I think DFACS -- if you
5 were investigating the administration of DFACS, if
6 it declared itself a civil investigation -- first
7 of all, the Kennerly case is --when it says the
8 language that opposing counsel relies upon. It is
9 interpreting Bartell. It says, Bartell says
10 special purpose grand jury's are only civil.
11 That's not what Bartell says. That grand jury was
12 civil and declared itself as such.

13 THE COURT: Do you know what the special
14 purpose grand jury in Bartell was tasked to do?

15 MR. WAKEFORD: The grand jury in Bartell
16 actually wasn't clear which statute that grand jury
17 was impaneled under. And the Court in Bartell
18 ultimately says, you know, it doesn't matter
19 because it says it's a civil grand jury. It could
20 have been under the regular grand jury statute.

21 THE COURT: Does that have to do with the
22 oaths that were administered?

23 MR. WAKEFORD: Yes.

24 THE COURT: And gosh, which provision
25 should they have used.

1 MR. WAKEFORD: Right.

2 THE COURT: Not to dive deeper into
3 Bartell, but what would distinguish Bartell for me
4 is if its charter was to determine if there had
5 been a violation of the city code in a non-criminal
6 way with the way something has developed. It had
7 nothing to do with alleged criminal activity.

8 MR. WAKEFORD: And the part of the
9 decision in Bartell is they say we don't know which
10 statute this grand jury was chartered under, so
11 there is no charter. But what the oath is Bartell
12 said is, do you swear to tell the truth in this
13 civil investigation into the Department of Family
14 and Child Services. It's clear. So, the Court of
15 Appeals says, it doesn't matter. It could be under
16 either because 15-12-100, the special purpose grand
17 jury statute says that you can be impaneled for
18 either. You can impanel one to investigate
19 anything that a normal grand jury can investigate.
20 A normal grand jury can investigate civil or
21 criminal proceedings. So, then we look -- I mean,
22 the language of the statute says that a special
23 purpose grand jury can be convened to investigate
24 any violation of the laws of this state. The
25 impaneling order which was issued by the chief

1 judge of this circuit said that any violation of
2 the laws of this state can be investigated within
3 the subject matter that is relevant for this
4 special purpose grand jury. And in the request
5 from the District Attorney for a special purpose
6 grand jury it was said over and over that there
7 could be possible criminal disruptions to the laws
8 of this state, and that is what it is
9 investigating. Over and over again this has been
10 emphasized.

11 Finally, you have the authority of a
12 special purpose grand jury who is investigating
13 criminal matters to make recommendations in its
14 report that certain criminal charges be pursued.
15 So to say that because of a line in Kennerly that
16 misinterprets the holding in Bartell that this is
17 somehow civil, and there is no amount of other
18 authority or specific information in this case can
19 say otherwise is -- well, it's just not true.

20 THE COURT: Well, let's say for a moment
21 that it's fair to characterize the special purpose
22 grand jury here as one that's engaged solely in
23 criminal investigation. Why does sovereign
24 immunity then not apply to the subpoena to the
25 governor?

1 MR. WAKEFORD: Well, sovereign immunity
2 -- if I could look to the constitution. This was
3 cited by opposing counsel. Article 1 Section 2
4 Paragraph 9. "It may waive the State sovereign
5 immunity from suit by enacting a state tort claims
6 act." I mean, we are talking about items and
7 matters that have absolutely nothing to do with the
8 criminal investigation.

9 Additionally, this is not a suit. This
10 is if they had meant any legal proceeding
11 conceivable they could have said so. But this is
12 talking about tort claims. This is talking about
13 proceedings against the State where the State is a
14 party. This is a subpoena to the governor as an
15 individual about his activities as a witness to the
16 actions of other people.

17 THE COURT: Well, yes. But to Mr.
18 Bauer's point it wasn't a witness where he happens
19 to be driving from home to work and there was an
20 accident or he saw people in a fight. It would
21 have -- the only reason he is connected to this is
22 because of his official capacity. And as I
23 understand the theory of the investigation
24 intreaties that he exercise his authority in
25 certain ways to benefit folks who thought that the

1 electoral outcome wasn't what it seem to be. So,
2 yes, witness. And I've seen nothing that suggests
3 the governor's anything but a witness, as in we're
4 interested in learning from you -- subject, not
5 target -- to get into that messy nomenclature that
6 raises pulse rates. But it is still in connection
7 with his official duties, which is why I think we
8 then need to explore the concept of sovereign
9 immunity. Because I don't think -- I think Mr.
10 Bauer acknowledged this. If the governor had been
11 driving home from work and had been going 90 in a
12 35 zone and hit someone and there was a lawsuit
13 over that accident I -- that would be victim of
14 accident versus the name of the governor. Not
15 governor in his official capacity. And I don't
16 think sovereign immunity would help him a lot
17 there, but it certainly -- if this were a civil
18 investigation this is the governor in his official
19 capacity responding how ever he did to people from
20 the outside of Georgia and inside of Georgia saying
21 why not take this course of conduct. Why not do
22 this. We ought to do that. So, it's -- to call as
23 an individual unless I am --you're much closer to
24 where this special purpose grand jury has gone, but
25 on the surface the lay person understands it to be

1 the governor as governor and not as I happen to
2 live in Georgia and these things happened.

3 MR. WAKEFORD: That analysis of whether
4 acts or official acts or acts in official capacity
5 is always undertaking when there is a lawsuit. So,
6 to put that analysis ahead of the determination of
7 whether this is a lawsuit or not puts the cart
8 before the horse. It inverts the analysis, and
9 it's just not relevant because this is not a
10 lawsuit. This is a subpoena to ask the governor to
11 be a witness in a criminal investigation. So, it
12 just doesn't apply. And if it did, I'm not sure if
13 the implications of their position have been fully
14 thought out and explored. Because police officers
15 are arms of the state, and they're subpoenaed to
16 appear in court proceedings all the time. I have
17 yet to hear that a police officer or state trooper
18 who is an employee of state government cannot be
19 subpoenaed to come in and provide testimony in
20 criminal matters.

21 THE COURT: GBI agent.

22 MR. WAKEFORD: If this position is
23 validated, the power of this court is entirely
24 destroyed with regard to a whole host of actors.
25 And it simply doesn't flow from logic or the way

1 the law is suppose to fit together. This grand
2 jury has asked the governor to come forward in the
3 same way that his legal advisor, under the laws of
4 this state, the attorney general was asked to come
5 forward. And as your Honor pointed out this is the
6 first we are hearing of this argument. And yet,
7 the legal advisor to the governor has come forward.
8 At no point was there a motion before this court
9 from the attorney general saying sovereign immunity
10 applies to me.

11 THE COURT: But that doesn't make the
12 argument a stronger or weaker argument. The timing
13 is peculiar, but we have explored that, and Mr.
14 Bauer, I think, helpfully reminded me there are a
15 bunch of different reasons why different state
16 actors would make different choices upon receiving
17 an invitation from the special purpose grand jury.
18 We're confronted with this motion at this point and
19 time and the merits of the sovereign immunity
20 argument I don't think hinge on when in the course
21 of the investigation or even more so when in the
22 course of the interactions in trying to get some
23 communication between your investigation and the
24 governor's office. It's come up and we need to
25 engage, all of us, both sides and myself, the

1 merits of the argument and not so much the timing.

2 MR. WAKEFORD: Aside from that, your
3 Honor, the application of the Floyd County cases
4 which specifically speak to the regular grand jury
5 statutes authorizing specifically civil
6 investigations in the State offices simply do not
7 apply under these circumstances for reasons that
8 should be obvious. This is not a regular grand
9 jury authorized to investigate a civil matter.
10 It's a special purpose grand jury specifically
11 authorized to investigate criminal matters. So, I
12 believe our position is clear and was clear in the
13 briefing and has been clear here today. This --
14 simply there is no application of sovereign
15 immunity in these circumstances, and this is not a
16 lawsuit. Sovereign immunity would be -- the
17 application here would be in contravention of
18 decades or centuries of practice in this state.
19 They've presented no authority to indicate to this
20 court that this court shouldn't grant quashal on
21 this case. And unless your Honor has additional
22 questions, I believe our position on this matter is
23 clear.

24 THE COURT: I have one last, and I'm
25 importing from the federal side. But this notion

1 that summoning in an active executive, sitting
2 president, sitting governor, sitting mayor. The
3 executive of whatever level of government you're
4 looking at. That's the issue. So, yes, maybe
5 there's immunity, but there's also just the policy
6 practicality of we don't do that because we need to
7 let that individual perform his or her important
8 function and when the sunsets on that
9 administration then let's have that conversation
10 with a person who occupied that office.

11 MR. WAKEFORD: Well, there is no
12 authority again for that position in the state of
13 Georgia. There is no gubernatorial immunity from
14 process. Whether he is the King of the state or
15 anything else, there is no basis in the law for a
16 position like that. The governor is not the
17 equivalent of the president. Additionally, I
18 believe that they're sort of a -- they're sort of
19 two considerations. They sort of say that he is
20 the sitting governor and therefore, he can't be
21 pulled in. But there is no basis for that. And
22 there's also a citation to cases under federal law
23 that invoked the touhy doctrine, which is
24 specifically promulgated in federal courts to say
25 that federal bureaucrats cannot be forced to

1 testify over the -- without the authorization of
2 their superiors. That is a wholly [indiscernible]
3 of federal law. Has absolutely no advocacy of
4 the Georgia law and doesn't impact --shouldn't
5 impact this court's analysis at all.

6 THE COURT: I think the word is agents
7 and not bureaucrats. But, yes.

8 MR. WAKEFORD: Pardon me.

9 THE COURT: That is what Touhy does.
10 That's definitely what Touhy does. Okay. I
11 appreciate that.

12 Mr. Bauer, was there anything you heard
13 that you just can't let go by or can we transition
14 to the next topic?

15 MR. BAUER: I get paid by the hour, your
16 Honor. I have two points.

17 THE COURT: Okay. Not by the word, by
18 the hour?

19 MR. BAUER: Right. So, I'll try to be
20 brief.

21 It is not our burden to show there is a
22 waiver of sovereign immunity, right. Constitution
23 says we have it. It's jurisdictional. The only
24 way the governor in his official duty can be hauled
25 into court for any reason if there's something and

1 maybe you've seized on something that I haven't
2 found that says, if it's criminal and he is a
3 witness, he could do it. You have the authority to
4 do it. But under the construct of our constitution
5 we don't have to give you that authority that says
6 you don't have the authority. They've got to show
7 you the authority for the waiver, and they haven't
8 done that. They've said we haven't done it, but
9 that's flipping the burden on its head. The
10 default is the State is immune from process absent
11 a waiver. They've got to show you the waiver.
12 This --

13 THE COURT: That is, indeed, what the law
14 says if sovereign immunity applies to that
15 situation. So, what I heard the State, meaning the
16 District Attorney's Office argument to be is we
17 don't need to point you to a waiver because
18 sovereign immunity applies to suits, actions, etc.
19 And you've responded. I get that. But I think the
20 two sides are talking passed each other a little
21 bit and definitely passed me because you don't have
22 the burden to show that immunity applies. They
23 need to show there's a waiver. Someone has the
24 opportunity to show me a case that says, oh, by the
25 way, that applies in a criminal context.

1 MR. BAUER: Sure.

2 THE COURT: I just have never seen that
3 case.

4 MR. BAUER: Well, this is a civil
5 proceeding so we haven't looked for that case for
6 you, but we will. But the only limitations to
7 lawsuits, claims, actions is when the general
8 assembly -- and in that language that he pointed
9 you to I think answers the question. I pointed you
10 to subsection (a) of Article 1 Section 2 paragraph
11 9. It says "the general assembly may waive the
12 State sovereign immunity from suit by enacting a
13 state claims act." That doesn't say the State only
14 has sovereign immunity for suits. It says, we're
15 immune. That's what subsection (e) says unless the
16 general assembly does something to reduce that.
17 And what (a) says is we're giving you general
18 assembly direction that one of the things you are
19 authorized to limit our jurisdictional bar on is a
20 state for claims act. So, general assembly, you
21 don't have to worry about this sovereign immunity
22 being a proper tort claims against the State
23 because we are telling you in the constitution you
24 can do that. You can say immune from suit by
25 enacting a state claims act. It doesn't say these

1 are the only things that we're waiving immunity
2 from or we need a waiver of immunity from.

3 The only other point I want to make is --
4 I think you sort of highlighted the slippery slope
5 of authorizing grand jury's to subpoena a sitting
6 governor during his term, during election -- I'll
7 let Mr. McEvoy talk about that -- to discuss the
8 conduct of his duties in office. You've
9 distinguished the cases I cited for you by saying
10 those -- maybe they're investigating DEACS and that
11 is the scope of their authority. But what if the
12 grand jury is investigating the mayor's office, not
13 beyond the historical realm of possibility in this
14 city. And what if the mayor who in past times
15 might have been in regular communication with the
16 governor as one would expect with two important
17 chief executives in the same state. Does that give
18 every grand jury that's investigating a city --
19 potential city crime the ability -- during that
20 governor's term -- to say you're going to come in
21 here and be a witness in our investigation to talk
22 about your performance of your duties in office. I
23 think sovereign immunity says you can't do that.
24 You have to find another way, State, to prove your
25 case without infringing on the chief executive's

1 immunities and privileges and separation of power's
2 protections unless we've said specifically you can
3 do it. Now --

4 THE COURT: Of course, the separation of
5 powers is executive, legislative and judicial.

6 MR. BAUER: Correct.

7 THE COURT: That's the third one.
8 Prosecution, governor, they're all in the same
9 branch so we're not separating a whole lot when
10 you're pitting a criminal investigation against
11 your theory that sovereign immunity actually
12 includes criminal investigations.

13 MR. BAUER: No, the reason is the
14 separation of powers constitutional concerns. I
15 know that Justice Blackwell would have agreed with
16 this. Because this is not the DA issuing a
17 subpoena to the governor.

18 THE COURT: It's the grand jury.

19 MR. BAUER: It's the grand jury in this
20 court. And that raises a problem that Justice
21 Blackwell has written about that I don't even know
22 if the courts of this state could enjoin the
23 governor in a claim in which sovereign immunity
24 theoretically doesn't apply. So that's what I
25 think the problem is here. We appreciate the

1 Court's time and attention to it.

2 THE COURT: You're welcome.

3 What's next, Mr. McEvoy?

4 MR. MCEVOY: Your Honor, before we turn
5 our attention to executive privilege, if I could
6 just respond to one issue regarding criminality of
7 special purpose grand jury.

8 THE COURT: Okay.

9 MR. MCEVOY: I think an important
10 distinction that you've raised, and if you look at
11 rule 6 of the federal rules of criminal procedure
12 and what federal criminal grand jury's are
13 authorized to do, that's return indictments. And
14 in our view that's the distinction between a
15 criminal procedure and civil procedure. Even in
16 the federal context you impanel a grand jury. You
17 want to look at some civil FDA issue, that grand
18 jury still has the power to return an indictment
19 even if it starts off as a civil inquiry. I liken
20 it to law enforcement. Did somebody have arrest
21 powers. If they have arrest powers, it's criminal
22 in nature. If you don't have arrest powers, it's
23 civil in nature. And I think that applies here.
24 And if you look at Chief Judge Brasher's order you
25 know the only thing that they're empowered to do is

1 make recommendations. In this country making a
2 recommendation about a criminal matter does not
3 empower to become a criminal matter.

4 THE COURT: Does the GBI ultimately make
5 a recommendation to the attorney general's office
6 about whether to seek an indictment of a statewide
7 gang matter that they've been doing?

8 MR. MCEVOY: So, that's a little bit
9 different, right. I mean, there is dual
10 jurisdiction. You know, now the FBI has dual
11 jurisdiction. The FBI can investigate something
12 criminally but make a civil recommendation. And we
13 see that false claims act context all the time.
14 It's frightening for somebody like me, but it --
15 but you can't have it the other way around. You
16 can't a civil investigator have arrest powers or
17 indictment powers just as a special purpose grand
18 jury has no power to bring charges against anybody.

19 THE COURT: Okay. But my question was
20 the fact that the GBI can't indict but they could
21 recommend to the attorney general that he pursue an
22 indictment following their investigation doesn't
23 make their investigation non-criminal.

24 MR. MCEVOY: But, your Honor, that's not
25 the province of a law enforcement officer. The

1 province of a grand jury is to return a true bill
2 or not return a true bill. That is the entire --
3 as you well know, that's the forum of the grand
4 jury. Forum of a police officer or detective,
5 they're not empowered to bring indictments. They
6 are --

7 THE COURT: Understood. But the fact that
8 they cannot bring an indictment doesn't make their
9 investigation non-criminal. That's all I'm getting
10 at. And this grand jury -- this special purpose
11 grand jury much like a GBI agent investigating
12 something, they don't have the power to indict, but
13 they have the power to gather information and
14 ultimately make recommendation to the District
15 Attorney. Hey, based on what we've got here, we
16 think you should indict, and I think -- I'm
17 analogizing here. I want you to distinguish it.
18 The way that a homicide detective might say, you
19 know what, we think you should bring this case or
20 FBI agents would bring to an assistant U.S.
21 attorney. We think you should bring this case.
22 That's not a civil investigation until it's
23 indicted.

24 MR. MCEVOY: Your Honor, that's not --
25 the role of grand jury, historically, is to either

1 bring criminal charges or not. This is a unique
2 body. They're not authorized to bring criminal
3 charges. I understand that it's related to some
4 potential criminal case that may or may not be made
5 down the road, but they don't have the power to
6 bring criminal charges, and we're just trying to
7 make distinction between criminal and civil. If
8 you have the ability to bring criminal charges it's
9 a criminal matter. If you don't, it's not.

10 THE COURT: Okay.

11 MR. MCEVOY: Your Honor, I was going to
12 address the executive privilege issue. You know,
13 some of the other issues that we're going to
14 discuss are kind of interwoven between one another,
15 and I just wanted to provide a little bit of
16 context, you know, historically as to why we're
17 here and how we're here. And, you know, one thing
18 Mr. Wakeford said is that Governor Kemp was asked
19 in the same way to be here as secretary of state
20 and attorney general. I think that's not really
21 true, and we sort of walked through that. But it's
22 important to note by way of background that your
23 Honor has it, Governor Kemp is just a witness in a
24 matter. Governor Kemp is someone that's ardently
25 defended the rule of law. He took appropriate steps

1 to protect the integrity of Georgia's election
2 process. He certified the presidential election
3 November 20, 2020, just as the constitution and
4 state law provide. He's now been identified as a
5 witness in this investigation. And the most
6 important point, your Honor, he has been willing to
7 engage in this investigation since April of 2021,
8 despite the fact that we have the belief as Mr.
9 Bauer explained that the Court and district
10 attorney's office and special purpose grand jury
11 lacked the jurisdiction to bring him in. We've
12 been engaging voluntarily. Now we're in the middle
13 of an election cycle for really the most closely
14 followed gubernatorial race in the country. There
15 may be one or two others that are close, but this
16 is certainly up there. This is happening,
17 coincidentally or otherwise, as this high profile
18 and politically charged investigation of Governor
19 Kemp's role in it are reaching a crescendo. The
20 intersection of law and politics in this way we
21 believe shouldn't be happening on the eve of an
22 election. And despite our willingness to engage
23 we're just asking that the rule of law be closely
24 followed in this matter. And we're going to talk a
25 little bit about, you know, the political impact

1 that this is all having later, but just to observe
2 while we're talking about the special purpose grand
3 jury that it's impaneled until May of 2023. And
4 the District Attorney's Office has publicly stated
5 repeatedly that it is in no rush to complete this
6 investigation. It's likely to last through the end
7 of this year.

8 THE COURT: So that I can put what you
9 want to share in context, because the politics of
10 this aren't my domain. You're sharing this because
11 it goes to the oppressive nature of the subpoena if
12 I find that it is not to be quashed because of
13 sovereign immunity, no jurisdiction or executive
14 privilege. I will have to hear that argument
15 because I want to make sure there's a point. You
16 have aired very publicly through your pleadings,
17 and the District Attorney has provided her
18 prospective in pleadings about some of the back and
19 forth and tit for tat and the politics. That's not
20 my space. So I don't want to open this proceeding
21 up to here's how we think the race is going for the
22 governor, and we think it has this political spin
23 or that. I don't think this is the right forum for
24 that, and you may not have been going there. I
25 want to make sure there's a good purpose for you to

1 explore what you want to explore since the slide in
2 front of everyone says "political impact of the
3 subpoena."

4 MR. MCEVOY: I'm sorry. I will get to
5 that, your Honor. And we're asking for a quashal
6 and modification. Quashal and/or modification on
7 several basis. One is executive privilege. The
8 other is attorney/client privilege, and the other
9 is the improper purpose of the subpoena, which is
10 sort of what this overview is meant to sort of tee
11 up. And later in the presentation we'll be showing
12 your Honor as your Honor has seen what the relevant
13 policy statements are around conducting an
14 investigation like this during an election cycle.
15 So our position, your Honor, may disagree. Our
16 position is within your Honor's province to take
17 some action if your Honor sees fit. Listen, I
18 don't want to repeat everything we've said in our
19 brief, and I do want to be very respectful of the
20 Court's time, but given the importance of this
21 matter to Governor Kemp, I do want to be thorough.

22 THE COURT: We'll strike the right
23 balance.

24 MR. MCEVOY: I'm working on it. The one
25 thing that is a little bit unusual, and there are a

1 lot of things that have been unusual in how this
2 has been handled. Just in my experience, it's our
3 effort to engage for whatever reason, you know,
4 this interview that was suppose to happen by
5 September of 2021, didn't happen. It didn't happen
6 in the beginning of 2022. It matriculates into the
7 spring pass the primary. At that point we asked
8 that it be pushed and the district attorney's
9 response was that it's unable to agree to push the
10 date of a future voluntary interview pass the date
11 of the general election. That's curious to us.
12 I'm not sure why that is, and I'm sure that the
13 district attorney will talk about that. But in
14 that time frame it only serves to increase the risk
15 of an unfavorable political impact which we'll get
16 to. And so, you know, I just say that as to kind
17 of tee up the discussion around executive privilege
18 which is one of the things that we have been trying
19 to discuss with the district attorney's office as
20 this court hasn't encouraged with other witnesses
21 since April of '21.

22 So, I want to talk about the application
23 executive privilege generally, and then also
24 specifically to this case. And the latter is a
25 little bit more complicated because we learned

1 about what they wanted to talk about for the first
2 time on Tuesday evening. But I want to address the
3 application of it generally, and I think, your
4 Honor, in our papers we made it pretty clear that
5 courts in other states have applied executive
6 privilege to governor's.

7 THE COURT: And so just as a starting
8 point you acknowledge that there is no codified
9 either in statute or case law executive privilege
10 in Georgia. You're seeking to import that concept
11 to this situation?

12 MR. MCEVOY: That's right. In the State's
13 response -- I mean, this was a little bit unusual
14 for me that the State said more notably having the
15 remaining 49 states rush to bestow such privilege
16 the executive -- upon their respective governor's.
17 By way of example, see State, ex. Rel v Dunn,
18 which is an Ohio case. And then they have this
19 quote. And so, we looked at that case and low and
20 behold they cited a dissenting opinion. So, the
21 only case that they cited that says executive
22 privilege does not apply to a governor. Actually,
23 says it applies to that governor.

24 THE COURT: In Ohio?

25 MR. MCEVOY: In Ohio. And that case says

1 the governor has an executive communication
2 privilege that applies to communications to or from
3 the governor when communications were made for the
4 purpose of fostering informed and sound
5 gubernatorial deliberations, policy making and
6 decision making. The State then goes onto say --
7 the DA's Office then goes onto say, special
8 prosecutor goes onto say, movant cites only two
9 cases to support the claim that several states have
10 found the existence of this executive communication
11 privilege. I thought that the pleading being 121
12 pages was probably long enough, but you know, for
13 your Honor and the district attorney's review we've
14 got 10 other cases that I was going to make
15 reference to. And rather than, you know, repeating
16 the cites out, if I could approach and provide
17 these to your Honor, and I've also included a copy
18 of the attached decision.

19 THE COURT: Before you go further with
20 executive privilege, I may have misunderstood in
21 your original brief. Are you arguing that
22 executive privilege precludes all testimony or it
23 like attorney/client privilege, legislative
24 privilege would cabin the governor's testimony
25 should he testify in certain ways. Because if it's

1 the latter, I don't -- you do need to articulate
2 why you think there is such a thing in Georgia.
3 But beyond that, I think we would need to work
4 through after we conclude today that threshold
5 question of is the subpoena quashed or not. If
6 it's not, then I think the governor falls into the
7 same broad category as many other witnesses who
8 have come before the special purpose grand jury
9 where you and your colleagues, the district
10 attorney's representatives and I would sit down and
11 say, here's a safe area, an allowable area or not.
12 I don't think we'll do that here and now.

13 MR. MCEVOY: Well, that is a great
14 suggestion and one we have been trying to
15 facilitate for 18 months. I'm happy to go through
16 a couple of analogous cases that have similar
17 findings, and the cites are all in front of your
18 Honor. In the state of Washington in the Freedom
19 Foundation case, the Court held that the executive
20 communication privilege applies to communications,
21 authored, solicited or received by the governor or
22 aids for purposes of fostering informed and sound
23 gubernatorial deliberations, policy making and
24 decision making. In New Jersey in the Nero case
25 the governor has privilege to protect

1 confidentiality communications pertaining to the
2 executive function. In California in the --

3 THE COURT: I see they're all listed
4 here.

5 MR. MCEVOY: They all apply to the
6 governor, your Honor. So, you know, just -- I
7 understand your Honor's point, this is not a case
8 directly on point in Georgia saying the executive
9 privilege applies to the governor in the same way
10 that it applies to the president. But the attorney
11 general's position is that it does. It's
12 consistent with 10 other states who have found the
13 same thing. And there is not a single case that
14 we've been able to find or that's been identified
15 by the District Attorney that says it does not. In
16 other words, no other state has come out and said
17 the executive privilege does not apply to the
18 governor. I don't know what else really to say
19 about the potential theoretical general application
20 of the executive privilege to the governor. I
21 think it's pretty clear. But to your Honor's point
22 I'm happy to kind of move onto the specifics.

23 THE COURT: Okay.

24 MR. MCEVOY: And Judge, this does require
25 a little bit of context, if you will indulge.

1 You know, one of the things that since we
2 first engaged with the district attorney's office
3 in April of 2021, when we were dealing with the
4 initial prosecutor Sonya Allen. We spoke with her
5 in April of '21, and they indicated they may want
6 to speak with the governor. We asked if we could
7 come in and discuss areas of inquiry. They didn't
8 respond to that. I wrote an e-mail to the District
9 Attorney on June 16th, made the same request. I
10 said it may facilitate the process if we could have
11 a conversation about the areas of inquiry. That
12 never happened. And as your Honor is well aware, I
13 think there are five or six other requests where we
14 have asked to come in and sort of give a proffer of
15 testimony so that we can facilitate these
16 complicated evidentiary issues despite our belief
17 that we have no obligation to do so. And so, I
18 thought that, you know, this issue of an attorney
19 proffer has become kind of a controversial issue in
20 this case. And I think your Honor has a
21 understanding of what an attorney proffer is, but I
22 just wanted to go over my understanding and what
23 we'd hoped to accomplish. Because in my
24 experience, both as a federal prosecutor and a
25 defense attorney, an attorney proffer is one of the

1 most commonly used tools in any significant
2 investigation. The purpose is to afford --

3 THE COURT: So it is frequently used, but
4 it takes two. And if the district attorney's
5 office isn't interested in doing that, and they
6 think that's the way to move forward is a subpoena,
7 we got to where we are. So I'm going to ask you to
8 focus on the subpoena, why it applies, why it
9 doesn't. If it does apply, how you think it ought
10 to be.

11 MR. MCEVOY: I appreciate that, your
12 Honor. But your Honor did ask why we're here and
13 how we got here. We did agree -- the district
14 attorney's office did agree in writing to allow us
15 to conduct an attorney proffer.

16 THE COURT: And then that didn't get to
17 happen.

18 MR. MCEVOY: And then everything changed.
19 On June 13th it's unilaterally revoked. We had a
20 date. They asked for dates for attorney proffer. I
21 gave them dates. June 24th to June 27th. This was
22 anticipation of a voluntary interview July 25th.
23 And on June 13th we get the rug pulled out from
24 under us. There will be no attorney proffer.
25 Actually, we've given August dates, and then on

1 June 13th the special prosecutor said those dates
2 are no good. You're not doing an attorney proffer.
3 Governor's got to come in sooner. And, you know,
4 if you don't give me new dates within 48 hours
5 we're going to issue a grand jury subpoena. This
6 is the first I've ever heard of a grand jury
7 subpoena because we've been operating in good faith
8 for over a year. And I noted the change in tone
9 and said there is no reason to threaten a grand
10 jury subpoena. I got the it's not a threat, it's a
11 promise. And I think the last time I heard that
12 line I was riding around in a big wheel. But we
13 understood the position had changed. So, we
14 provided those dates within 48 hours, but the hope
15 was that we could still facilitate some
16 conversation about the subject matter that would be
17 discussed with the sitting governor who is agreeing
18 to voluntarily come in. Okay. It didn't happen.
19 And so, you know, what is interesting is what has
20 happened since. You know, it's somewhat -- you
21 know -- even when your Honor was conducting a
22 hearing on June 22nd regarding some similar issues,
23 and you know, Ms. Pearson asked at a minimum you
24 asked the State and DA's Office to provide buckets
25 to us before the people are brought in. Your Honor

1 said that's a fair request and sort of worked
2 through it, and that's what we have been trying to
3 do. And, you know, whether one is an experienced
4 prosecutor or leading an investigation like this
5 for the first time, I'm just troubled by the fact
6 that we weren't treated like --and we were not
7 given the ability to discuss these important
8 evidentiary issues. And you know call me a wordy
9 word, but I don't think I would be doing any client
10 a service, let alone the sitting governor, if I
11 were to walk that client into a meeting unprepared,
12 not knowing the first thing what's going to be
13 talked about. And all we were told is well, we
14 want to talk to him about some conversation between
15 the secretary of state and the president that he
16 wasn't on, and what he knows about it and what he
17 doesn't know about it. Well, we have now learned
18 for the first time in a public filing on Tuesday
19 night that the areas of inquiry are much more
20 detailed and much more significant. And so, you
21 know, talk about the politics of all this and
22 political impact regardless of whether it's
23 politically motivated or not the ABA and DOJ policy
24 focus on political impact. This clearly has a
25 political impact. It has a political impact when a

1 public filing for the first time you list all these
2 areas of inquiry. And so I don't know what purpose
3 that serves. In other words, I'm trying to figure
4 out why we were not able to have that conversation
5 with the district attorney's office that we've been
6 requesting for over a year. And as your Honor is
7 aware the tone changed things. You know, became
8 for some reason adversarial. And all that we were
9 asking in advance of what ultimately became July
10 25th, voluntary interview, were just standard
11 prophylactic measures that any prudent attorney
12 would take before bringing someone into
13 investigation. Particularly if, as the district
14 attorney's office says, it's a criminal
15 investigation. I take those things seriously,
16 Judge. And so to your Honor's question, the answer
17 is I don't know. You know, there is a lot of
18 information here on this page. They're talking
19 about phone calls between people that we were never
20 involved in. They go through this detailed, you
21 know, litany of information that's never been
22 discussed with me, and therefore, I've never had
23 the opportunity to discuss it with my client. And
24 they end by saying "the District Attorney submits
25 that the above clearly relevant information is just

1 the start of what may be revealed through the
2 movant's grand jury witness testimony." So there's
3 a lot there to unpack, and we would just renew our
4 request that we be given the opportunity to discuss
5 that with the district attorney's office as your
6 Honor has suggested in other cases. And by the
7 way, I think I have probably been involved in more
8 than a hundred attorney proffers as a prosecutor
9 and defense attorney. I have never had the
10 experience of a prosecutor telling me that she
11 wouldn't let me come in and hear what I had to say.
12 And as a prosecutor I've never told someone you
13 can't come in and proffer evidence. Because I know
14 how helpful it is to the process. And I'm also not
15 familiar -- I have practiced all over the country,
16 and I have never had any state or federal
17 prosecuting agency tell me that there was a policy
18 against an attorney proffer. So we have been
19 trying to come in voluntarily, facilitate the
20 dialogue to discuss executive privilege,
21 attorney/client privilege, those types of things.
22 They have rejected at every turn. And then for the
23 first time they do what we were asking to do, but
24 they do it in a public filing. So, I'm at a little
25 bit of a disadvantage to talk about the specific

1 application of the executive privilege without
2 knowing as your Honor has said what the questions
3 might be how they're asked, what the subject matter
4 is. We've got to be given that opportunity to do
5 that, and certainly would not allow any client to
6 go into the grand jury separated by counsel and
7 have to parse through, you know, these very
8 complicated privileges, whether it's
9 attorney/client privilege or otherwise. So, you
10 know, what we have proposed repeatedly and will
11 propose again-- I don't know if it's within your
12 Honor's power to do it now, but it's very simple,
13 Judge. And as Mr. Bauer said we're a little
14 frustrated, too. If the district attorney's office
15 agrees to address these outstanding evidentiary
16 privilege issues an attorney proffer in advance of
17 a voluntary interview that takes place after
18 November 8th, all of these issues will be resolved.
19 As Mr. Bauer said, we can't waive sovereign
20 immunity, but we'll do what we've said from day one
21 and come in voluntarily, and that's all we have
22 been trying to do, Judge. I think that executive
23 privilege pretty clearly applies if we're talking
24 about it generally. Whether it applies
25 specifically on subject matter they want to ask him

1 about, the answer is, I don't know, it depends. We
2 have been able to identify certain things where we
3 don't think it applies. Happy to talk to him about
4 it. We just haven't had that conversation.

5 THE COURT: When you say come in for a
6 voluntary interview, and from some of the exchanges
7 that I've had with you and the district attorney's
8 office always present together, there 's the notion
9 of an interview as in before the grand jury because
10 they're the body that will be issuing this
11 recommendation and so they might have questions
12 that the prosecutor didn't think of versus a
13 voluntary interview solely with the district
14 attorney's office? So, it's a voluntary interview
15 before whom? Assuming these other attorney proffer
16 happens, you work through concerns about privilege,
17 all three of them, etc., that's a voluntary
18 interview in front of the grand jury? It's a
19 voluntary appearance, in other words?

20 MR. MCEVOY: It's exactly what we had
21 agreed to. A voluntary interview with the district
22 attorney's office. That's what was scheduled and
23 what became publicized on July 25th in advance of
24 that after the attorney proffer was canceled by the
25 district attorney's office. In last ditch efforts

1 in discussing these issues in advance we sent an
2 e-mail on July 20th that, you know, everybody's
3 seen, where we asked to discuss the topics in
4 advance -- some questions in advance to deal with
5 these issues. In response to that July 20th e-mail
6 the interview was canceled, grand jury subpoena was
7 issued. Here we are.

8 THE COURT: So the conversations that you
9 and Mr. Wade and others and I had about finding a
10 date that works not just with the governor's
11 schedule but yours, I thought that was for an
12 appearance before the grand jury and not -- I don't
13 need to get in the middle of -- I ought not to be
14 asked to get in the middle of setting up an
15 interview. I was brought in because there were
16 concerns about the reasonableness of the district
17 attorney's office's insistence on a particular date
18 for an appearance before the grand jury which we
19 can call interview. I don't really care what label
20 you put on it, but it's structurally different as,
21 you know, appearing in front of the grand jury
22 versus sitting down with representatives of the
23 DA's Office. So, I don't want to misunderstand
24 what you're describing. Not that I get to enforce
25 any of this other than I'm being asked to enforce

1 or quash the subpoena. But what you can negotiate
2 with the DA's Office that's your powers of
3 persuasion and what not. So, that's where I'm
4 confused.

5 MR. MCEVOY: Well, your Honor, I'm just
6 trying to tell you what happened. We had an
7 agreement for a voluntary interview. We had an
8 agreement to conduct a proffer session on either
9 June 24th or June 27th. That agreement was
10 unilaterally terminated on June 13th. We were told
11 to give dates sooner than August for voluntary
12 interview or a grand jury subpoena would be issued.
13 We did do that with the hopes of continuing to have
14 a dialogue of previewing some of these topics in
15 advance to facilitate conversation and not having
16 to come before your Honor, which we would have
17 certainly have to have done multiple, multiple,
18 multiple times. And then in an effort when I made
19 those requests in advance of a voluntary interview
20 on July 25th, that offer for voluntary interview
21 was revoked. We were issued a grand jury subpoena
22 on July 29th. It was at a time when I was planning
23 to be in the middle of the Grand Canyon going down
24 the Colorado River. And your Honor and the
25 district attorney's office was kind of enough to

1 push it back one week. It was during that period
2 of time we were trying to assess what our options
3 were put into this box where we then had to invoke
4 sovereign immunity because we still were not given
5 any clarity about what would be discussed. And it
6 wouldn't be proper for any lawyer to take their
7 client in let alone the sitting governor of the
8 state of Georgia under those circumstances. And
9 this has all been sort of highlighted and very well
10 reported in the media, and that will get to the
11 discussion that we have later about the political
12 impact. But it -- we did not want to be here.

13 THE COURT: So I'm clear, voluntary
14 interview is different from grand jury appearance?

15 MR. MCEVOY: Right.

16 THE COURT: Okay. All right. Thanks.
17 I guess I will hear from the district attorney's
18 office. I guess we're talking about executive
19 privilege. If you feel compelled to engage on the
20 back and forth with the e-mails and invitations, do
21 so. Very, very briefly, I'm more interested at
22 this juncture hearing about executive privilege if
23 that's something you want to respond to.

24 MR. WADE Very briefly, Judge.

25 THE COURT: Always makes me nervous. Not

1 just from you.

2 MR. WADE: It just has become abundantly
3 clear to the State that Mr. McEvoy is going to
4 respond in a manner that he gets across a message
5 that's not even relevant. The Court has
6 insistentlly, consistently stated to Mr. McEvoy and
7 our side that the Court is not interested in
8 hearing certain aspects of even the pleadings. Mr.
9 McEvoy has ignored that as he has done through this
10 process. He has ignored our communication. He's
11 ignored clear communication to him because he wants
12 to drive the way that the State is proceeding with
13 its investigation. Mr. McEvoy clearly is not in
14 favor of the State electing to not move forward
15 with an interview outside of the grand jury process
16 or the special purpose grand jury room. The State
17 has elected to do that. That is not Mr. McEvoy's
18 call. That rests solely with the District Attorney
19 and the District Attorney has made that decision
20 through the power of the special purpose grand
21 jury. Mr. McEvoy starts to talk about an e-mail
22 exchange between the two sides, which the Court has
23 clearly stated it does not have an interest in, and
24 we would not go there. However, Mr. McEvoy made
25 specific reference to his e-mail, and I'd like to

1 address that briefly here. In Mr. McEvoy's e-mail
2 he outlines requirements. He said these are the
3 requirements for our client to come and sit and
4 speak with you. One of the requirements is we're
5 to get in advance --well, in advance each and every
6 question that's to be asked. Well, that's his
7 call. And that's not the State's position. The
8 State's position was that his client would come in
9 and speak in front of the special purpose grand
10 jury just as a host of 30 plus other witnesses have
11 done. That's all. At that juncture, Judge, during
12 the course of the interview, what really broke down
13 the conversation was within the e-mail. Mr. McEvoy
14 says that the only way that that interview would
15 take place, the only way that a voluntary interview
16 would take place is if we didn't record it. Well,
17 our intent was to record it so that the special
18 purpose grand jury could see and hear for
19 themselves what the testimony was. Accurately.
20 Well, that's an issue. We can't record it to show
21 the special purpose grand jury accurately what is
22 reflected during the course of the questioning,
23 then it becomes too much of a control issue. Mr.
24 McEvoy was attempting to control our efforts to
25 ascertain the information that we were seeking.

1 Now, I did say briefly, that's brief. However, I
2 will allow Mr. Wakeford to come up and address the
3 other issue for the Court.

4 THE COURT: Thank you for sharing that.

5 Mr. Wakeford?

6 MR. WAKEFORD: Your Honor, each witness
7 who has come before the special purpose grand jury
8 and raised an issue of privilege, if the parties,
9 meaning members of the district attorney's office
10 and counsel for that witness cannot come to an
11 agreement about the application of that privilege,
12 it is elevated to your Honor and decided based on
13 the specifics of the situation at hand. That is
14 still available. And if the governor appears to
15 testify, that process will still be in place.

16 THE COURT: True. What about the
17 threshold argument that executive privilege, if
18 applied in Georgia, would bar all testimony because
19 the inquiries are about what the governor did in
20 the exercise of his office?

21 MR. WAKEFORD: I have -- I'm not sure if
22 I understand their argument to be that all inquiry
23 whatsoever into anything the governor did is barred
24 by a claim of executive privilege. I believe it
25 would be the process of deliberation before a

1 decision is reached. Anyway, any arguments about
2 executive privilege don't go to factual
3 determinations which privilege doesn't touch.
4 Whether something happened, whether something was
5 said is not reached by privilege. And so the total
6 quashal, the absolute quashal of a subpoena which
7 they're seeking is just not appropriate. This is
8 again something we could talk about again on a
9 question by question basis if your Honor is
10 participating in the process.

11 THE COURT: So if it applies you'd
12 analogize it to legislative privilege which
13 precluded some area of questioning for certain
14 witnesses but allow others. And you'd work through
15 that either as you've described it, the lawyers
16 sorted it out or as group we sorted it out?

17 MR. WAKEFORD: That is just a reflection
18 of the sovereign immunity argument. It's just the
19 same. It's the same argument where I don't know
20 whether it was in jest or not, but the governor is
21 the King. The governor is the State and body, and
22 therefore, this court has no authority to tell the
23 governor to do anything. That's the same thing
24 with the executive privilege argument, and that is
25 not the case. There's no recognized gubernatorial

1 privilege in Georgia, first of all. And second, it
2 would have to be tailored to actual questions which
3 are being asked.

4 THE COURT: Okay. Thank you.

5 Mr. McEvoy, you're back up. Not much of
6 a rest for you.

7 MR. MCEVOY: No. And I'll be brief, your
8 Honor. I know that your Honor does not seem to be
9 too receptive to this argument, but I would like
10 just to be able to brief it.

11 THE COURT: I'm open minded. Expand my
12 horizons.

13 MR. MCEVOY: I will say on executive
14 privilege it applies to document and other
15 materials that reflect presidential decision
16 making, and it applies pre-deliberative and post
17 decisional material as well. So our view it is
18 pretty broad. I agree with the DA's Office. We
19 may be able to carve some things out that he could
20 talk about is what we've been trying to do. I'm
21 happy to do it under the right circumstances. The
22 problem and final ground that we believe is
23 appropriate for quashal is because of the
24 significant political impact that this
25 investigation has had on Governor Kemp. The timing

1 of the investigation, it's political impact have
2 reached a point we believe where it has been
3 violative of existing DOJ, ABA, the National
4 Prosecution Standards. And they all direct that
5 any political impact should be avoided. Quote.
6 "Such investigative action that could impact the
7 outcome of an election is greatly diminished once
8 voting has concluded." The ABA's criminal justice
9 standards provide similar guidance. These
10 standards which are quote "intended as a guide to
11 conduct for a prosecutor actively engaged in a
12 criminal investigation or performing a legally
13 mandated investigative responsibility state when
14 due to the nature of the investigation or the
15 identity of the investigative targets any decision
16 will have some impact on the political process such
17 as an impending election. The prosecutor should
18 make decisions and use discretions in principle
19 manner and a manner designed to limit the political
20 impact without regard to the prosecutor's personal
21 political beliefs or affiliation." And finally,
22 the ABA, the Criminal Justice Standards 3.6 on
23 prosecutorial investigation says, "whether one
24 agrees that this investigation -- what I just read
25 was from the ABA. And so there's been discussions

1 about whether this investigation is politically
2 motivated, whether it's not. Whether one agrees
3 that it is politically motivated or not, I think
4 there's some evidence to suggest that no one can
5 deny that this investigation had and continues to
6 have political impact which is the standard under
7 the relevant policies. I've got a couple of
8 exhibits. Exhibit C and Exhibit A that I would
9 just like to publish, your Honor. And these are
10 just represented examples of what happened out in
11 the world hours after we believe we were forced to
12 file our motion to quash.

13 THE COURT: Okay.

14 MR. MCEVOY: So look, I understand you've
15 got political candidates trying to gain traction
16 with some segment of voters, but as an attorney and
17 not a politician it doesn't sit with me, and
18 doesn't sit well with policies that I've just
19 enumerated. Obviously, we've discussed and
20 debated, had very reasonable debate about a refusal
21 to testify. I don't think it's because he'll do
22 anything to win an election, right. So these
23 things happen, as I said hours -- that's 9pm on
24 April 18th. I think we filed our motion that day.
25 It's having a political impact.

1 THE COURT: What's having that impact was
2 the decision to file the motion. I will do my best
3 to refrain from descending into the political chaos
4 that I know some folks really really want to talk
5 about, and the pundits can do that. But is -- was
6 not setting aside the sovereign immunity concern --
7 and I'm not minimizing those in anyway. Setting
8 those aside, would not the path of least
9 resistance, least attention, least political fire
10 from any direction to have been we agreed on a
11 date. You were available. You had confirmed the
12 governor was available. Appear. Come in through a
13 secure entrance. Leave. It's a non-event. I may
14 be missing it. But because it's in your brief and
15 because you argued, look, this is -- these
16 political impacts, it's not fair and per all the
17 policies that you correctly cite, DOJ, ABA, etc.
18 Isn't the answer how about November 15th to come in
19 for whatever coming in means. Right now that's not
20 the posture we're in. But Z happened because what
21 had originally been negotiated didn't happen.

22 MR. MCEVOY: That's right.

23 THE COURT: Okay.

24 MR. MCEVOY: Is that where we are, Judge,
25 in society in our legal system where I don't

1 believe anyone should be punished politically or
2 otherwise for invocation of a legal right or
3 privilege. That's what happened here. We didn't
4 want to be here. We agreed to something. They
5 disagreed. They created a controversy. We had to
6 respond. Who benefits from that controversy? Not
7 Governor Kemp. He doesn't benefit from that. And
8 I don't think it's fair to punish Governor Kemp
9 from invoking a legal right of privilege. That, by
10 the way, he doesn't have the authority to waive
11 sovereign immunity. And by raising it, was he
12 hiding? Judge, we're still a society that's
13 governed by the rule of law. The District
14 Attorney's Office is free to pursue any type
15 investigation without fear, but it also must do so
16 without favor and without the threat of impacting
17 our election integrity. That's something Governor
18 Kemp has fought very hard to protect and maintain.
19 And the district attorney's office has said they
20 don't want to have a political impact. I
21 appreciate that. So the easiest thing to do is
22 kick this down the road 75 days. Your Honor is
23 well aware of where we are, what state we're in,
24 what race we're facing and, you know, the governor
25 ought not have to suffer political consequences for

1 invoking a legal right. I think the district
2 attorney's office would agree with that. And so,
3 in our -- it's our position there's a very simple
4 solution for that. I don't understand why his
5 appearance has always been tied to coming before
6 the general election, but it has. This
7 investigation is going on until the end of year
8 anyway. Special grand jury is impaneled until May
9 of '23. I don't see any significant investigative
10 harm to pushing it. It's consistent with DOJ
11 policies. It's consistent with ABA policies. And
12 that's all we're asking for.

13 MR. WADE: Before we respond we got kind
14 of lost in the argument. Two screens ago Mr.
15 McEvoy posted an opinion by the attorney general
16 that specifically referenced a criminal
17 investigation to criminal statute. Well, not 20
18 minutes ago the argument was this wasn't criminal.
19 So we got kind of lost in the argument. Is it
20 criminal or is it not? Was is their position?
21 Because if it's not criminal then that slide two
22 screens ago would not be applicable. So, we're
23 just trying to figure out which side does the Court
24 want us to argue.

25 THE COURT: I want you to argue your

1 side, whatever that may be. I noticed the
2 situation that you noticed. You don't have to sigh
3 everytime you come up.

4 MR. WAKEFORD: So, refraining from
5 sighing, your Honor. The District Attorney
6 publicly stated earlier in 2022, that although this
7 special purpose grand jury was impaneled in May it
8 would not begin conducting business until June,
9 specifically, to avoid public activity, in order to
10 avoid interference with the political primaries
11 which were decided in late May. In those contest,
12 perhaps, no one was more visible for obvious
13 reasons than the governor's own contest against an
14 opponent whose involvement and opinions about the
15 matters relevant to this special purpose grand jury
16 could not have been more public, more vehement or
17 more vitriolic if you watch the debate between the
18 two individuals before the governor's primary.
19 That was a specific delay which the District
20 Attorney publicly stated she would take. She would
21 decide to pursue. After communications breakdown
22 there is a -- well, they breakdown because of a
23 July 2022 e-mail in which requirements for the
24 governor's voluntary interview are stated by Mr.
25 McEvoy and the word "requirements" is very

1 specifically used. Another phrase that is used in
2 that July 20th e-mail is a politically motivated
3 investigation. It has been their position since
4 before the voluntary interview was -- could not
5 move forward before a subpoena was issued. This
6 was their stated position that, well, this is a
7 politically motivated investigation. They put it
8 in writing to us. What is the District Attorney
9 suppose to do with that when she has already tried
10 to move the date of any involvement pass an
11 entirely contentious primary that the governor was
12 participating in. When the District Attorney had
13 engaged in negotiations to have a voluntary
14 interview even after the special purpose grand jury
15 was seated and was subpoenaing other witnesses. As
16 in deference to the respect afforded the office of
17 the governor, communications and negotiations about
18 voluntary interview continued until requirements
19 were stated by the governor's office. Because in
20 their words this was clearly a politically
21 motivated investigation. At that point what more
22 is there to discuss? There was an agreement to a
23 date after a subpoena was issued. There was an
24 original subpoena date, and then there was a
25 conversation which your Honor participated between

1 the parties where counsel for the governor pointed
2 out I can't do that date. For personal reasons I
3 can't be there on that date. So, there was an
4 agreement among the parties that another date eight
5 days later would be appropriate. That was agreed
6 to. Another subpoena was issued and accepted. And
7 on the day before that agreed to day of the 18th
8 they filed this motion. All of these issues
9 existed. All of these positions they have didn't
10 arise in the eight days -- seven days between when
11 they agreed to a date and they filed their motion.

12 And finally, I think this is very
13 important to understand where they're saying
14 they're being persecuted for raising this position.
15 Or they decided to raise it on the eve of a date
16 that they agreed to specifically after requesting
17 that it be moved.

18 Additionally, the media -- as we point
19 out in our brief the media had already reported,
20 incorrectly as it turns out, that the governor had
21 appeared and provided testimony, whether it was a
22 voluntary interview or before the special purpose
23 grand jury. This was reported in the media widely
24 that on July 25th the governor had appeared and
25 provided testimony. No one from the district

1 attorney's office contradicted that. No one from
2 the governor's office contradicted that. The story
3 was over. There were no statements by anybody
4 else. There was not a fire storm. There was not
5 an eruption of controversy; it was quiet. If the
6 governor had appeared on August 18th, driven into a
7 secure location and brought into the building,
8 appeared, provided testimony, left, there would
9 have been no story. There would have been no
10 controversy. There would be no political
11 implications. There would be nothing to talk about
12 because the story for media purposes was over.
13 There was no testimony to hear about because it had
14 already happened. But instead they waited until
15 the day before the governor was suppose to appear,
16 the date they agreed to, and then they filed this
17 motion and made public statements about how they
18 could not cooperate at this stage. So, to
19 continually insist that this is a situation
20 engineered by the district attorney's office to the
21 intentional detriment of the governor is just not
22 true. The facts before the judge make that clear,
23 and to insist otherwise -- well, your Honor can
24 make your own determinations about the validity of
25 those arguments. That is the District Attorney's

1 position as to this. If he'd just come in we had
2 talked about these issues even with you that day
3 there would have been no story because the story
4 was already over. Instead the governor's counsel
5 created the story by not just choosing to file the
6 motion, but choosing to file it in this way after
7 getting the date that they requested. Thank you.

8 THE COURT: You're welcome.

9 MR. MCEVOY: Your Honor --

10 THE COURT: So, I don't want to hear
11 anymore back and forth about who had what
12 agreement, about voluntary interview or not and
13 dates. I'm now familiar with the timeline.

14 MR. MCEVOY: Sure.

15 THE COURT: And of course, none of this
16 impacts sovereign immunity and jurisdiction, but it
17 does go into if that argument fails how do we
18 structure things going forward. And I feel very
19 comfortable now that I understand not every aspect
20 of the back and forth but enough to make some
21 informed decisions. So, if there are other topics
22 you want to cover, Mr. McEvoy, in connection with
23 the motion you filed that brought us here in a
24 public setting, I'm happy to hear other topics.

25 MR. MCEVOY: Well, I want to reiterate its

1 impact. It's not intentional. It's political
2 impact. No one has denied there is significant
3 political impact and that's the concern. And
4 certainly would have been impactful had we gone in
5 voluntarily on July 25th and given a statement
6 which we're not fully prepared, and it was
7 recorded. And one of the things we asked for was
8 to enter into a nondisclosure agreement so it
9 wouldn't -- they wouldn't do that, right. So then
10 we bring in the governor to a voluntary interview
11 that, you know, they put in a publicly available
12 documents so everybody would know about it. And if
13 it didn't go well and there was no 6(e) grand jury
14 secrecy protection, what would have happened. I
15 mean, we are damned if we do, damned if we don't.
16 We come in, it's going to be politicized. If we
17 don't come in, it's going to be politicized. We
18 invoke legal rights, it's politicized. And we are
19 just in a difficult position which underscores the
20 difficult balance of conducting a high profile
21 political investigation in the middle of an
22 election.

23 MR. WADE: Judge, if I might.

24 THE COURT: You mightn't. That's okay.
25 Unless it's a different topic. If it's in response

1 to what Mr. McEvoy said, I think that was a good
2 re-summation of what he already said. Good meaning
3 accurate. I think it fit what he said before.
4 Nothing new. So, if you are going to address that
5 same thing, we've covered that turf. But if
6 there's another topic that you'd like to cover, by
7 all means.

8 MR. WADE: Another topic, Judge, but it's
9 dealing with the issue at hand, which is we
10 proposed that if we treat this just as we've
11 treated other witnesses, which is that the day Mr.
12 McEvoy comes in with his client, the morning of,
13 we'd share with him our buckets. After we get
14 through sharing with Mr. McEvoy the buckets he can
15 then speak with his client. They can get their
16 plan of action, and we can start the examination
17 process.

18 THE COURT: It's a tried and trued method
19 that has worked for many similarly situated
20 individuals. So, I think if and when we go forward
21 that would be the model that we'd use.

22 MR. WADE: Yes.

23 THE COURT: Mr. McEvoy, Mr. Bauer, Mr.
24 Dove, anything else that you want to get before me
25 since we're all together right now in connection

1 with the motion to quash that you filed?

2 MR. MCEVOY: No, your Honor. We didn't
3 discuss attorney/client privilege, but I think the
4 same frames parameters apply.

5 THE COURT: Definitely. And insofar as
6 the governor might have a reason to raise a
7 legislative privilege because of some whoa he had
8 with the legislature. Preserve, protected and
9 would be navigated if we get to that point of, oh,
10 he's confronted with those kinds of questions.

11 Okay. The Power Point that you put up,
12 is it in here somewhere; is it one of those tabs or
13 is this just all the e-mails again?

14 MR. MCEVOY: I've have got an extra copy
15 for your Honor.

16 THE COURT: That would be great. Before
17 you leave if I could get that. I kept trying to
18 find some of your slides because they come off the
19 screen.

20 MR. MCEVOY: May I approach?

21 THE COURT: Mr. Wade, Mr. Wakeford,
22 anything else from the District Attorney's Office
23 at this time?

24 MR. WADE: Nothing else from the State,
25 Judge. Thank you.

1 THE COURT: So, as I see the sequencing,
2 I need to work through the sovereign immunity issue
3 that the lawyers for the governor have raised that
4 Mr. Bauer articulated here in court. If I agree
5 with Mr. Bauer's arguments then there is no
6 jurisdiction that this Court enjoys to enforce any
7 subpoena and then the two sides would need to
8 discuss other ways in which to get information from
9 the governor if that's how things would flow. It
10 just wouldn't be anything I have any role in. It
11 could include appearing before the special purpose
12 grand jury, but that would be because everyone
13 agreed to do that as opposed to anyone was
14 compelled to do that. If I end up agreeing with
15 the District Attorney's/State's position on
16 sovereign immunity or lack thereof in this context,
17 then we'll need to have discussions about how to
18 move forward, and I will spend sometime before we
19 would have that discussion thinking through the
20 concerns Mr. McEvoy raised about the political
21 impact, not motivation, but the impact of having
22 not just a sitting governor but a governor who is
23 in the midst of a race for his office. Whether
24 that should occur, his appearance before or after
25 the election is over. So, I'll need to make both

1 those decisions before we would regroup. And if
2 the decision is favorable to the district
3 attorney's office, I will need to let everyone know
4 my thoughts about the timing of an appearance, and
5 then we could discuss procedural next steps.

6 Is there anything, Mr. McEvoy, that you
7 think I should be working through or Mr. Bauer,
8 that I should be working through in addition?

9 MR. BAUER: I just want to make sure that
10 it's on your radar that if you are inclined to deny
11 the motion to quash on jurisdictional grounds, that
12 issue should go up on a --it is an interlocutory
13 issue. It is a discretionary appeal. If you look
14 at Turner v Giles, which is a 1994 case. 264 Ga.
15 812. That kind of immunity question the Supreme
16 Court has said barring some exceptional
17 circumstances mandating a different outcome needs
18 to go up on an interlocutory basis.

19 THE COURT: I'm hearing you say two
20 different things. It's discretionary or not
21 discretionary. Discretionary whether the Supreme
22 Court would hear it or discretionary as to whether
23 I would issue the certificate of immediate review?

24 MR. BAUER: Both. And --

25 THE COURT: I guess it's always at the

1 top end whether they want to hear it or not.
2 Regardless of their -- I don't control what they
3 do. I focus on what -- so, you're saying it's
4 discretionary, except under Turner it's not
5 discretionary?

6 MR. BAUER: Well, the Supreme Court says
7 under our appellate statute it's not an automatic
8 right appeal. It's not considered a collateral
9 order that you get a direct appeal without a
10 certificate from trial court. But what Turner says
11 to the trial court is --

12 THE COURT: You better issue a
13 certificate.

14 MR. BAUER: So take a look at that
15 decision, your Honor, because we will ask you in
16 that circumstance to give us one.

17 THE COURT: Can you give me that cite
18 again, please?

19 MR. BAUER: Yes, sir. Turner v Giles.
20 264 Ga. 812.

21 THE COURT: That's a nondiscretionary
22 discretion.

23 MR. BAUER: Couldn't have said it better.

24 THE COURT: Yeah. The Supreme Court
25 could say it better apparently. I will assume

1 there would be appellate ramifications to whatever
2 decision I make, but I'll read Turner and see what
3 I need to do.

4 Anything more from the district
5 attorney's office?

6 MR. WADE: Nothing, Judge. Thank you.

7 THE COURT: Well, everyone, thank you for
8 your time. Appreciate it. We are concluded here,
9 and I will be in touch.

10 MR. MCEVOY: Thank you, your Honor

11 (Whereupon, the proceedings are
12 concluded.)

C E R T I F I C A T E

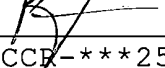
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COUNTY OF FULTON:

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THIS, THE 6TH DAY OF MARCH, 2023

/s/ Karen Rivers 
*** (KAREN RIVERS), CCR-***2575
RPR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF FULTON COUNTY